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No. 83-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

HARPER & ROW, PUBLISHERS, INC. and
THE READER'S DIGEST ASSOCIATION, INC.,

Petitioners,

VS.

NATION ENTERPRISES and THE NATION
ASSOCIATES, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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187 pp

QUESTIONS PRESENTED

1. Does the First Amendment require that the scope of copyright protection for a work of non-fiction be narrowed?

2. Does the First Amendment prevail over Copyright in a fair use case, where the copyrighted material allegedly published in the name of harvesting knowledge was in fact soon to be published by the copyright owner?

3. Should the court, in a fair use case, give weight to the facts that the use was non-productive and the material taken was from an unpublished manuscript?

THE PARTIES

The parties before this Court are those set forth in the caption.*

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* Pursuant to Ru'e 28.1 of the Rules of the Supreme Court: Petitioner Harper & Row, Publishers, Inc. states that it has no corporate parent and that other than Fitzhenry & Whiteside Ltd., a Canadian corporation, it has no subsidiaries or affiliates (other than wholly-owned subsidiaries). Petitioner The Reader's Digest Association, Inc. states that it has no corporate parent and no publicly-owned subsidiaries or affiliates.

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Petitioners,

vs.

NATION ENTERPRISES and THE NATION
ASSOCIATES, INC.,

Respondents.

Petitioners Harper & Row, Publishers, Inc. and The Reader's Digest Association, Inc. respectfully pray that a writ of certiorari issue to review the order and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on November 17, 1983.

OPINIONS BELOW

The majority and dissenting opinions of the Court of Appeals are reported at 723 F.2d 195 (2d Cir. 1983), and are annexed hereto as Appendix A. The district court opinion is reported at 557 F. Supp. 1067 (S.D.N.Y. 1983) and is annexed hereto as Appendix B. The District Court's Supplemental Findings of Fact and Conclusion of Law, not reported, are annexed hereto as Appendix C.

JURISDICTION

The opinion and order of the Court of Appeals was entered on November 17, 1983. A timely petition for rehearing and rehearing *en banc* was denied on January 4, 1984, and this petition for certiorari was filed within 90 days of that date. The order denying rehearing is annexed hereto as Appendix D.

This Court's jurisdiction is invoked under 28 U.S.C. § 2101(c) (1976).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I Sec. 8 of the Constitution provides that:

> The Congress shall have Power . . . to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.

The First Amendment to the Constitution provides that:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Section 107 of the Copyright Revision Act of 1976, 17 U.S.C. § 107 (1976), provides that:

> Notwithstanding the provisions of section 106, the fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not

> an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include –
>
> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> (4) the effect of the use upon the potential market for or value of the copyrighted work.

STATEMENT OF THE CASE

Petitioners Harper & Row, Publishers, Inc. ("Harper & Row") and The Reader's Digest Association, Inc. ("Reader's Digest") are the owners of the publication rights to "A Time to Heal," the memoirs of former President Gerald R. Ford. Shortly before publication of this book, Respondents, Nation Enterprises and The Nation Associates, Inc. ("the *Nation*") received a copy of the manuscript from a clandestine source. Quickly copying from the unpublished work, and without adding independent commentary, the *Nation* published in their weekly magazine an article entitled "The Ford Memoirs-Behind the Nixon Pardon." The *Nation* had ascertained the memoirs' book publishing schedule, and knew their article would be appearing just two weeks before *Time* was to print licensed excerpts. Petitioners brought suit in Federal district court for copyright infringement under the Copyright Act of 1976, 17 U.S.C. §101 *et. seq.* and 28 U.S.C. §1338(a).

After a bench trial, the district court held that the *Nation* article quoted and paraphrased Mr. Ford's copyrightable expression, and that the fair use doctrine did not exonerate defendants' copying.

The Court of Appeals for the Second Circuit reversed in a 2-1 decision. The majority (Kaufman, J.) held that most of the material quoted and paraphrased by the *Nation* was not protectible under the copyright laws and that the balance of the copying was permissible under the fair use doctrine.

STATEMENT OF FACTS

The Ford Manuscript

On February 28, 1977 former President Ford entered into a publishing contract with plaintiffs, granting them the exclusive rights to publish and sell his memoirs in book form and to license the right to publish excerpts in newspapers or periodicals prior to book publication. (Findings 6-7, C 5-6)[1]

President Ford hired an experienced writer, Trevor Armbrister, to assist him in preparing his memoirs, and they worked together on them for approximately two years. Mr. Ford intended the memoirs to be as informal as possible, based upon his own recollections and without reliance on documents. Armbrister felt the memoirs should be very human and reflect the personal side of Ford's public service. (Findings 9-10, C 6-7).

Armbrister participated in over 200 2-hour taped interviews with Ford which were transcribed in 3,600 legal sized pages. Both participants spent considerable time preparing for the interviews, and Ford drafted "word portraits" of major figures and essays on various subjects. (The latter included Ford's perception of Nixon's character copied almost verbatim by the *Nation*). Armbrister also conducted 2,600 legal sized pages of

[1] The following abbreviations are used:

Findings	–	Findings of Fact and Conclusions of Law of The District Court, Reproduced in Appendix C to this Petition
PTX___	–	Plaintiffs' trial exhibit__
DTX __	–	Defendants' trial exhibit__
TR ___	–	Trial transcript at the page indicated
Dep. at__	–	Deposition transcript at the page indicated

taped interviews with numerous other people, including Alexander Haig, Nelson Rockefeller, Henry Kissinger and President Ford's aides. These were used to check and stimulate Mr. Ford's recollections and reconstruction. (Findings 10-15, C 7-10; Armbrister TR 90-91, 124-25; E 38-39).

Armbrister completed a first draft in February 1979. President Ford reviewed, edited and then revised the initial typescript. Three further, complete word-for-word editing sessions involving President Ford, Armbrister and others occurred, with the former President personally making many changes in each draft. President Ford's March 1979 changes in the galleys were so extensive that one of the editors described it as a "rewriting." (Findings 17-19, C 11-12).

The manuscript, which used the former President's own words from the Ford-Armbrister dialogues, had Mr. Ford's full and final approval of the selection and arrangement of all of its contents, as well as of the language employed. (Finding 20, C 11-12).

The Author's Agreements with Harper & Row and Reader's Digest

An exhibit to the publishing contract stated that Mr. Ford's memoirs would:

> "describe in close personal terms Mr. Ford's experiences when he became Vice-President, and then President, of the United States. Within the bounds of good taste and personal loyalties, this account will present significant hitherto unpublished material about (1) Mr. Ford's relationship with former Preident Nixon, including Mr. Nixon's reactions to the crisis arising from the Watergate break-in; (2) the circumstances and reasoning surrounding the pardon of Mr. Nixon by Mr. Ford; and (3) Mr. Ford's reflections on this period of history, and the morality and personalities involved." (Finding 21, C 14-15).

In the contract Ford also acknowledged that the value of the rights granted would be substantially diminished by his public discussion of the "unique information not previously disclosed" about his career and personal life and that he would "endeavor" not to disseminate any of such information. However, the agreement also provided: "Spontaneous and brief statements by Author in response to reporters shall not be considered a breach of the foregoing provision." (Finding 22, C 15-16).

Ford, as President, had testified extensively concerning the pardon before a Sub-Committee of the House Committee on the Judiciary under Representative Hungate. In this case he testified that he had already disclosed publicly while in office all of the facts about the pardon. In addition, after leaving office and while preparing his manuscript, he responded to press and audience questions about the pardon during interviews and speeches. (Findings 22-23, C 15-16; PTX 14, Ford Dep. 16-18, 59-60). There was no evidence that Mr. Ford withheld comment about the facts of his public life after leaving the Presidency.

Ford's publishers also understood that the memoirs' unique information not previously disclosed would relate to Ford's personal thoughts and feelings about the events of his Presidency, rather than the events themselves. (Finding 24, C 17).

The License to Time Magazine

On March 14, 1979 when work on the memoirs was nearing completion, the plaintiffs licensed to *Time* the exclusive right to publish (before book publication) excerpts from Chapters I and III, which *Time*'s editor described as the "most interesting and moving parts of the entire manuscript." The excerpts were to appear in *Time*'s April 23 issue to go on sale at newsstands on April 16, 1979. *Time* paid $12,500 upon signing the license and was to pay another $12,500 upon its publication of the excerpts. *Time* was allowed to renegotiate the second installment in the event there was any publication from Chapters I and III before *Time*'s. (Findings 27-29, C 18-19; PTX 40, Cave Dep. 16-17).

The Nation Article

In December 1977, a new group of investors acquired the *Nation* magazine with avowed goals of increasing circulation and advertising revenue and turning the magazine around financially. Their plan included efforts "to stay on top of the news on a week-to-week basis" and the appointment of Victor Navasky as Editor. Navasky was a Yale Law School graduate with broad experience in journalism and public affairs. (PTX 33, Navasky Dep. 3-6, 8, 10-12, 16, 18).

In late March 1979, a person, never identified, secretly gave Navasky a copy of the unpublished manuscript of the memoirs. Navasky knew that his receipt of the manuscript was unauthorized. Over the next 24 hours or weekend, the *Nation* rushed into print for its April 7, 1979 edition, a 2,250 word cover-featured piece "The Ford Memoirs-Behind the Nixon Pardon", derived almost exclusively from the memoirs, 83% (1,870 words) of which was copied or closely paraphrased from the unpublished manuscript. (Findings 33-36, C 20-22; E 1-41).

The extent of the copying has never been disputed. The nature of it can be readily seen by examining Plaintiffs' Exhibit 11, reproduced as Appendix E to this Petition, containing a side-by-side comparison of the *Nation* article and the Ford manuscript. As can be seen from a review of this exhibit, the copying included Ford's personal expression of the events and personalities of his Presidency, and of his feelings about those events and personalities.

For example, defendants quoted verbatim Ford's reflections on his reasons for pardoning Richard Nixon:

> Years before, at Yale Law School, I'd learned that public policy often took precedence over a rule of law. Although I respected the tenet that no man should be above the law, public policy demanded that I put Nixon— and Watergate— behind us as quickly as possible. (E 26-27)

The *Nation* also directly copied Ford's account of his reactions to seeing Mr. Nixon in the hospital, and his views on Mr. Nixon's character:

> He was stretched out flat on his back. There were tubes in his nose and mouth, and wires led from his arms, chest and legs to machines with orange lights that blinked on and off. His face was ashen and I thought I had never seen anyone closer to death.
>
> • • •
>
> A terribly proud man, he detested weakness in other people. I'd often heard him speak disparagingly of those whom he felt to be soft and expedient. (Curiously he didn't feel that the press was weak. Reporters, he sensed, were his adversaries. He knew they didn't like him, and he responded with reciprocal disdain.)
>
> His pride and personal contempt for weakness had overcome his ability to tell the difference between right and wrong. (E 28-29, 38-39).

Defendants' trial testimony further demonstrated that defendants sought to, and did, copy Ford's expression. Mr. Navasky testified that he quoted Ford's portrait of Nixon because "this was his (Ford's) own way of saying it." (Navasky, TR 456). He quoted Ford's evaluation of the reasons for granting the pardon "because of the absolute certainty with which he expressed himself." (*Id.* at 455). He quoted Ford's account of the negotiations with Ron Ziegler because "...when Ford writes about this as a narrator, it was the definitive quality of the statement that made me put it in." (*Id.* at 457). And he quoted Ford's account of Nixon's assurances of innocence because it was "a much more powerful statement for the reader." (*Id.* at 452).

The *Nation*'s piece was placed on sale by April 3, 1979 despite defendants' knowledge of plaintiffs' contract with *Time* for publication in *Time*'s issue to be on sale April 16th, and despite the *Nation*'s awareness of the scheduled availability of the full

book in bookstores from May 1, 1979. The *Nation* also knew that the published memoirs' commercial success would depend on public reaction to the *Time* excerpts, and were aware that the same portions which defendants copied would be of interest to *Time*. (*Nation* Article, E 6; Navasky TR 538; Findings 34, 67, C 21, 28-29).

At the time of publication, the *Nation* proclaimed its purpose of "scoop(ing) former President Ford on his own memoirs." (PTX 22). They intended to make a "news event" for the wire services by recounting Ford's story of the pardon as he told it, without independent commentary. (Navasky TR 452-53, 467-68, 536-38).

Navasky's notes show that he had initially intended to include a section in his article which would critically explore the issues which he perceived the memoirs raised. (PTX 19). However, he eschewed this approach, because "It looks like I didn't have time to... The story I wrote, which I did very quickly because we wanted to get it out as soon as possible, seemed to work without my going into this other stuff" (PTX 33, Navasky Dep. 60).

Due to their rush, the *Nation* also failed to check the record or realize that the pardon-related events recounted were well known, and that Ford's story was not based on government documents or information which Ford had sequestered from public view. (Findings 44-46, C 24-27; Navasky TR 484-89; Armbrister TR 29-30).

Time's Reaction

The appearance of the *Nation*'s piece caused *Time* to cancel its plans to publish excerpts and to refuse payment to plaintiffs of the $12,500 that would otherwise have been due upon *Time*'s publication. (Finding 38, C 22-23).

REASONS FOR GRANTING CERTIORARI

The majority opinion by Judge Kaufman raises important issues concerning the relationship between Copyright and the

First Amendment. In its analysis both of copyrightability and of fair use, the majority found that First Amendment considerations prevailed over copyright considerations. However, the majority's restrictions on copyrightability, which conflict with the decisions of other circuits, are not needed to advance First Amendment freedoms. And the majority's fair use decision did not strike the proper balance between the important policies of encouraging authorship and facilitating the dissemination of information. On the one hand it downplayed authorship. On the other, it sanctioned a use of copyrighted material, in the name of harvesting knowledge, even though the same material was soon to be published by the copyright owner.

The majority opinion also conflicts with this Court's recent decision in *Sony*, by giving no weight to the fact that the use was non-productive, and conflicts with the clearly expressed legislative intent in enacting the Copyright Act of 1976, by disregarding the fact that the material used was unpublished.

I

The Majority, in Conflict With the Holdings of Other Circuits, Redefined and Severely Limited the Scope of What is Protectible Under the Copyright Laws in a Work of Non-Fiction. These Holdings are Not Required to Advance First Amendment Freedoms.

In three holdings of major importance, which conflict with the rule in other circuits, the majority set down new definitions of what is protectible under the copyright laws in a work of non-fiction. Thus the majority held (a) that in works concerning news and history, the "troublesome" concept of expression must be limited to "its barest elements - the ordering and choice of the words themselves" (A 19), (b) that facts coupled with expression cannot constitute a copyrightable totality (A 21), and (c) that almost unlimited paraphrasing from a work of non-fiction is permissible, unless the copier has "borrowed virtually an entire work". (A 17).

These rulings are in conflict with the decisions of other circuits, as well as prior decision by the Second Circuit itself.

(a) Limiting Expression to its Barest Elements

Contrary to the holding below, no other circuits have held that in the context of news or history, "expression" is a "troublesome concept" which must be limited to its "barest elements." As early as 1921, the Seventh Circuit held protected the "arrangement and manner of statement" of news and facts. *Chicago Record-Herald Co. v. Tribune Ass'n.*, 275 F. 797, 799 (7th Cir. 1921). The Court there stated: "...if the whole of it were considered as stating news or facts, yet the arrangement and manner of statement plainly discloses a distinct literary flavor and individuality of expression peculiar to authorship, bringing the article clearly within the purview and protection of the Copyright Law." The Seventh Circuit followed this holding in *Eisenschiml v. Fawcett Publications*, 246 F.2d 598 (7th Cir. 1957), *cert. denied*, 355 U.S. 907 (1957), there defining copyrighted expression in a historical work to include "the association, arrangement and combination of ideas and thought and their form of expression..." *Id.* at 603.

In *Miller v. Universal City Studios*, 650 F.2d 1365 (5th Cir. 1981), involving alleged copying from a work of non-fiction concerning a highly publicized kidnapping, the Fifth Circuit upheld an instruction to the jury which stated that while a general theme cannot be copyrighted, "its expression throughout the pattern of the work, the sequence of its events, the development of the interplay of its characters and its choice of detail and dialogue can by copyrighted." *Id.* at 1368. In *United States v. Hamilton*, 583 F.2d 448, 450 (9th Cir. 1978), the Ninth Circuit accorded protection to a mapmaker's "selection, arrangement and presentation" of terrain features.

Prior holdings by the Second Circuit as well have rejected the narrow definition of protectible expression now espoused by the majority. In *Wainwright Securities, Inc. v. Wall Street Transcript Corp.*, 558 F.2d 91 (2d Cir. 1977), *cert. denied*, 434 U.S. 1014 (1978), the unanimous court stated:

> It is, of course, axiomatic that "news events" may not be copyrighted. But in considering the copyright protection due a report of news events or factual developments, it is important to differentiate between the substance of the information contained in the report, *i.e.*, the event itself, and "the particular form or collection of words in which the writer has communicated it." ***What is protected is the manner of expression, the author's analysis or interpretation of events, the way he structures his material and marshals facts, his choice of words, and the emphasis he gives to particular developments.*** Thus, the essence of infringement lies not in taking a general theme or in coverage of the reports as events, but in appropriating the "particular expression through similarities of treatment, details, scenes, events, and characterization." In a parallel manner, the essence or purpose of legitimate journalism is the reporting of objective facts or developments, not the appropriation of the form of expression used by the news source. *Id.* at 95-96 (citations omitted; emphasis supplied).

See also Nutt v. National Institute Inc. for the Improvement of Memory, 31 F.2d 236 (2d Cir. 1929) (court protected "association, presentation and combination of the ideas and thought" which went to make up plaintiff's lectures on memory improvement); *Orgel v. Clark Boardman Co.*, 301 F.2d 119, 120 (2d Cir. 1962), *cert. denied*, 371 U.S. 817 (1962) (court protected plaintiff's "analysis, organization of material, phrasing and citations" in a book on real estate condemnation proceedings).[2]

[2] The majority's narrow definition of "expression" is also in conflict with district court decisions in the eighth and ninth circuits. Thus, in *Holdredge v. Knight Publishing Corporation*, 214 F. Supp. 921 (S.D. Cal. 1963), the court applied the "association, arrangement and combination of ideas and thoughts" definition to determine what was copyrightable in the plaintiff's biography of a historical figure. And in *Amana Refrigeration Inc. v. Consumers Union of the United States, Inc.*, 431 F. Supp. 316, 324 (N.D. Iowa 1977), the court rejected an argument that a consumer's union report on a particular product was not copyrightable because it was merely a "bald statement of fact without originality" finding instead that the paragraph which had been copied from the report was "more than mere statement of fact. It contains defendant's original analysis and conclusion and is copyrightable."

(b) Denying Copyrightability to Facts Coupled with Expression

The ruling that fact coupled with expression cannot constitute a copyrightable totality conflicts with the holdings of other circuits on two counts.

First, the unauthorized copying of works consisting primarily of factual material has been held to be an infringement by a number of circuits. Thus, copyright protection has been accorded to "the arrangement, expression and manner of presentation" of mathematical data and formulae concerning hydraulic cylinders, *Flick-Reedy Corp. v. Hydro-Line Mfg. Co.*, 351 F.2d 546 (7th Cir. 1965), *cert. denied*, 383 U.S. 958 (1966); to the selection, ordering and arrangement of the names and addresses of suppliers of gardening materials, *Schroeder v. William Morrow & Co.*, 566 F.2d 3 (7th Cir. 1977); to a telephone directory, *Leon v. Pacific Telephone and Telegraph Co.*, 91 F.2d 484 (9th Cir. 1937); and to the selection and arrangement of cases under particular sections of the Ohio code, *W.H. Anderson Co. v. Baldwin Law Pub. Co.*, 27 F.2d 82 (6th Cir. 1928).

Second, the majority's rejection of the totality concept is in direct conflict with a line of cases in the Ninth Circuit. In *Roth Greeting Cards v. United Card Co.*, 429 F.2d 1106 (9th Cir. 1970), the Ninth Circuit held that although the textual material in a greeting card was in the public domain, this did not end the inquiry into the copyrightability of the entire card. Rather the court held the "proper analysis" of the issue required that all elements of each card, including text, arrangement of text, artwork and association between artwork and text be considered "as a whole." *Id.* at 1109.

In *United States v. Hamilton*, 583 F.2d 448 (9th Cir. 1978), the Ninth Circuit adhered to the doctrine of *Roth*. There the court rejected the defendant's argument that the map which it had copied was not entitled to copyright because it was merely a synthesis of information already depicted on maps in the public domain, finding instead that "when a work displays a significant element of compilation, that element is protectible even

though the individual components of the work may not be, for originality may be found in taking the commonplace and making it into a new combination or arrangement." 583 F.2d at 451.

And in *Sid & Marty Krofft Television Productions v. MacDonald's Corp.*, 562 F.2d 1157 (9th Cir. 1977) the Ninth Circuit also rejected the defendant's "invitation to dissect the works," holding that "...it is the combination of many different elements which may command copyright protection because of its particular subjective quality." *Id.* at 1169.

Even a prior decision of the Second Circuit has endorsed the "totality" concept which the majority below rejected. In *Jeweller's Circular Pub. Co. v. Keystone Pub. Co.*, 281 F. 83 (2d Cir. 1922), *cert. denied*, 259 U.S. 581 (1922) the court found that the defendant had infringed the plaintiff's copyright to its compilation of trademarks, stating "if a man compiles a book containing such information [name, occupation, place of business, residency] about the residents of a particular place, *he may... copyright it as a whole*, notwithstanding the fact that the separate parts of which it is composed are not copyrightable." *Id.* at 87 (emphasis supplied).

(c) Allowing Virtually Unlimited Paraphrasing From a Work of Non-Fiction

Finally, the holding that paraphrasing from a work of non-fiction constitutes infringement only if the copier "borrowed virtually an entire work" is in conflict with the holdings in several circuits. In *Flick-Reedy Corp. v. Hydro-Line Mfg. Co.*, 351 F.2d 546 (7th Cir. 1965), the Seventh Circuit found infringement where defendant had paraphrased two pages of a 32-page booklet containing mathematical data and formulae. In *Meccano v. Wagner*, 246 F.603 (6th Cir. 1916), *aff'g* 234 F. 912 (S.D. Ohio 1916), the Sixth Circuit upheld a finding of infringement based upon paraphrasing of some of the statements and descriptions in an instruction manual for mechanical toys. In *W.H. Anderson Co. v. Baldwin Law Pub. Co.*, 27 F.2d 82, 86-87 (6th Cir. 1928), the Sixth Circuit found infringement after

reviewing 54 instances of "paraphrasing or identities of expression" taken from the plaintiff's 11 volume work. Finally, in *Meredith Corp. v. Harper & Row, Publishers, Inc.*, 500 F.2d 1221 (2d Cir. 1974) *aff'g* 378 F. Supp. 686 (S.D.N.Y. 1974), the Second Circuit upheld a temporary injunction based upon paraphrasing from a competing college textbook, where the amount copied was approximately 11 % of the infringing book and a smaller percentage of the book that was infringed. [3, 4]

Underlying the majority's three holdings limiting copyrightability was its perceived need to "construe the concept of copyrightability in accord with First Amendment freedoms." (A 19). The majority feared that unless it limited the scope of copyright protection in the manner outlined above, an "individual could become the owner of an important political event merely by being the first to depict that event in words" (A 19) and a public official could "take private possession of the most important details of a nation's historical and political life by adding language here and there on the perceptions or sentiments he experienced while in office and insisting that the work's entire contents are thereby made his alone by virtue of copyright." (A 21)[5]

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[3] The extent of paraphrasing in the infringing book is set forth in the district court's subsequent opinion in the case, *Meredith Corp. v. Harper & Row, Publishers, Inc.*, 413 F. Supp. 385 (S.D.N.Y. 1975). The extent of paraphrasing of the book that was infringed is based on counsel's personal knowledge of the record in that case.

[4] District courts have also held that paraphrasing of less than an entire non-fiction work or an entire chapter of a non-fiction work constitutes infringement. For example, in *Henry Holt & Co. v. Liggett & Myers Tobacco Co.*, 23 F. Supp. 302 (E.D. Pa. 1938), the court held that the defendant's paraphrasing of three sentences from the plaintiff's scientific book on the human voice constituted infringement because "...it is not necessary that the whole or even a large portion of the book shall have been copied. It is sufficient if a material and substantial part shall have been copied, even though it be but a small part of the whole." *Id.* at 303.

[5] The majority also stated that "[a]dditional reasons preclude a finding that much of the material is copyrightable", citing President Ford's testimony before the Hungate Committee and the use of conversations attributable to other persons. While we dispute the contention that this material standing alone

But these fears are unfounded. The individual would not become the "owner" of the event by being the first to depict it in words. He would become only the owner of his own description of the event. And even that ownership is subject to the limitation of the doctrine of fair use. Therefore, in determining whether a particular use is fair, a court applying this doctrine will consider all competing policy interests, including First Amendment interests.

The majority's rationale for limiting the scope of copyright protection also has no application to the facts of this case. Petitioners were not seeking protection for facts and memoranda in isolation, and in findings that are unchallenged, the District Court expressly found that these facts and memoranda:

> "...were of interest to The Nation only to the extent that The Nation could set forth Ford's views about them or the manner in which Ford said his life had been affected by them. The Nation certainly had no interest in presenting these historical facts and memoranda in isolation. Rather, it is the totality of these facts and memoranda collected together with Ford's reflections that made them of value to The Nation." (B 10-11).

The restrictions the majority has placed on copyright protection are not limited to the memoirs of former Presidents. Under the broad language of the opinion, the new limitations

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(cont.)
is not copyrightable, it is not necessary to reach this issue. As the District Court stated,

> "This principle [that the copyright laws protect the totality of the facts and memoranda collected together with Ford's refections] governs the portions of Ford's memoirs reciting the statements of individuals other than Ford as well. I decline to enter the thicket of deciding which statements were exact quotations—and therefore not protected by copyright—and which were merely constructions of statements pieced together by Ford—and therefore copyrightable. I suspect that most were to some degree reconstructions. Suffice it to say that, simply viewed, I regard the historical facts, memoranda, and statements as integral and necessary components of the context of Ford's revelations as to his state of mind while involved in governmental affairs of the highest consequence." (citations omitted) (B 11).

will apply to all works of non-fiction (where extensive paraphrasing is permissible) and all works of news and history (where "expression" is limited to its "barest elements"). The number of literary works to which these new rules apply is significant indeed. For example, in 1982 alone there were 38,526 new titles (including new editions) published in the United States of which more than 25,000 were works of non-fiction. In the category of biography and history, there were in excess of 3,000 titles (including new editions). *The Bowker Annual of Library & Book Trade Information*, 372-3 (28th ed. 1983). Obviously the total number of books in print at any given time far exceeds the titles published in a single year.

Moreover, the limitations on what is protectible will not be limited to cases in which copyrighted material has been used by the news media. It will include any use of such material by anyone, including even directly competing uses, such as the publication of a competing textbook.

Equally important, the greatly increased use of copyrighted material permitted by the majority's holding on copyrightability will not be subject to any of the factors traditionally considered by a court applying fair use doctrine. The majority has, in effect, transformed a fair use question into an issue of copyrightability. There is a vast difference between sanctioning a use of material because the use is fair, and sanctioning such a use because the material is entitled to *no* protection at all. Under the fair use approach, a court will consider all factors relevant to the "equitable rule of reason" which the fair use doctrine embodies. The majority's approach, in contrast, precludes any consideration of these equitable considerations. A court following the majority approach must therefore sanction the use even if society derives no benefit from it, and indeed even if the use is harmful to important policies underlying the Copyright Act. As we shall demonstrate in Point II, that is precisely what happened in this case.

II

The Majority's Fair Use Analysis Did Not Strike The Proper Balance Between the Constitutionally Based Policy of Encouraging Authorship and the First Amendment.

The majority saw this case as requiring it to find the proper balance between "the author's monopoly of his original writings" on the one hand and "the citizenry's need to be informed" on the other. (A-24)

Both policies are important and, indeed, constitutionally based. Finding the right accomodation is an important function of the fair use doctrine. The majority, however, did not strike the proper balance.

On the copyright side, the majority referred frequently to the "monopoly" of the author, but nowhere acknowledged that underlying the monopoly is an important public policy. As this Court recently observed in *Sony Corp. v. Universal City Studios*, U.S. , 104 S.Ct. 774, 782, 78 L.Ed.2d 574 (1984):

> "...the limited grant is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired."

Moreover the majority downplayed authorship, as we have demonstrated in Point I, by defining what is protectible in such a way as to eliminate important elements of authorship. The majority thereby gave no consideration to the elements of authorship considered by the dissent: "method of treatment, emphasis, selection of exact details, or anything else that makes the copyrighted work original." (A 42).

Finally, by reason of its arbitrary definition of authorship, the majority saw the case as involving only a "very limited use

of copyrighted words" (A 29) and the taking of a "meager, indeed infinitesimal amount of Ford's original language." (A 30). Had the majority applied the correct standard, it would have faced a case involving extensive taking of expression.

On the free speech side of the balancing, the majority's analysis was equally defective. In the majority's view, application of the copyright laws to this use would "impede that harvest of knowledge so necessary to a democratic state." (A 4).

As publishers, we would be the first to recognize the importance of that policy, but it has nothing to do with this case. For there was nothing that the *Nation* did here that facilitated the harvesting of knowledge. The material was about to be published, as excerpts in *Time* magazine in about two weeks, and in full in book form about two weeks after that. The knowledge was going to be harvested in any event, by reason of authorized publications planned by the author and his publishers.

The majority nowhere acknowledges this. Nor does the majority make any attempt to demonstrate that society derived some benefit from publication in the *Nation* two weeks in advance of publication in *Time*, or four weeks in advance of publication in book form.

Rather than facilitating the harvest of knowledge, the *Nation* has simply taken upon itself the right to be the first publisher of President Ford's expression, a right expressly conferred on President Ford by the copyright laws and licensed for value to the plaintiffs. The editor of the *Nation* aptly characterized his own article when he said that he had "scoop(ed) former Preident Ford on his own memoirs". (PTX 22). It is that which the majority has sanctioned, not the harvest of knowledge.

The precedent set by this case will adversely affect both the incentives to authorship and the dissemination of information.

Under the holding it is clear that one may, with impunity, "steal" a manuscript and publish its contents, at least if one takes

care to paraphrase less than the entire work. If the manuscript is returned, no offense has been committed. In the majority's view "merely removing" under those circumstances constitutes "too insubstantial an interference with property rights to demonstrate conversion." (A 12-13). Nor is there any liability for trespass to chattels, for that requires "a showing of actual damage to the property interfered with." (A 13, fn. 5).

The sanctioning of such conduct will not only require a publisher to turn his publishing house into an armed camp. It will also impair his ability to license the publication of excerpts in advance of book publication. Aware of the import of the holding, publishers will know that if they circulate a manuscript to ascertain third party interest in acquiring such rights, there is a real risk that someone will take for free that which is being offered for sale.

This impediment to the exploitation of rights will lessen the incentive for authorship and adversely affect the dissemination of knowledge. Publication of excerpts in advance of book publication serves an important public purpose of disseminating knowledge of the contents of the book to the readers of the magazine, frequently an audience far larger than the readers of the book. To the extent that publishers are deterred by the majority holding from licensing pre-publication excerpts, that important public purpose will not be served.[6]

Indeed, this case illustrates such an adverse impact. Since *Time* cancelled its publication, the net result of the *Nation*'s publication was that excerpts from the manuscript were disseminated to the public not in *Time* magazine, but in the *Nation*, a magazine that obviously reaches a far narrower audience. It is ironic that this result was approved in the name of harvesting knowledge.

[6] The New York Times on March 16, 1984 reported that "[t]o insure against leaks" Random House had decided not to offer Governor Cuomo's new book to book clubs or magazines. The book was described by Governor Cuomo's agent as "one of the most thoughtful pieces of writing ever committed by a political figure" and the author as a "highly articulate, deeply introspective man writing about public life in a way that's enormously revealing without being invidious." The New York Times, at C22, col. 2.

The dissenting judge, whose view of the case was not distorted by the errors discussed above, concluded that the only freedom the majority has advanced here was the freedom to "chisel[] for personal profit." (A 48). The sanctioning of such conduct will surely have an adverse impact on authors and publishers.

III

The Majority Gave no Weight to the Facts That (a) The Use Was Non-Productive and (b) the Manuscript Was Unpublished. The Former Holding Conflicts With This Court's Decision in *Sony*. The Latter Conflicts With Clearly Expressed Congressional Intent.

The majority made two additional errors in its fair use analysis. First, in conflict with this Court's decision in *Sony*, the majority gave no weight to the undisputed fact that this was a non-productive use. As the dissent observed, the *Nation* article was "of trivial originality and contained no independent research by the author." (A 42). Apart from an introduction, which told of the publication plans for the book, and a conclusion, which promised a future article dealing with the ethics of what it had done, the *Nation* added only transition sentences and phrases. (Finding 36, C-22).

The majority openly acknowledged that it gave no weight to the fact that the use was non-productive, criticizing the dissent's requirement that "legitimate news add original commentary or contain original research." (A 26). The majority stated "[that] sounds distinctly like asserting that 'fair use' turns on the amount of the user's labor. The Second Circuit has rejected that approach." (A 26-27).

This holding that the non-productive nature of the use was entitled to no weight is inconsistent with the views recently expressed by this Court in *Sony Corp. v. Universal City Studios Inc.*, U.S. , 104 S.Ct. 774, 78 L.Ed.2d 574 (1984).

The entire Court in *Sony* believed that whether or not a use is productive is an important factor in determining fair use. Indeed the four dissenters believed that that factor was controlling. After setting forth several examples of fair use, the dissent stated:

> Each of these uses, however, reflects a common theme: each is a *productive* use, resulting in some added benefit to the public beyond that produced by the first author's work. The fair use doctrine, in other words, permits works to be used for "socially laudable purposes." ...I am aware of no case in which the reproduction of a copyrighted work for the sole benefit of the user has been held to be fair use. (emphasis in original; citations omitted) 104 S.Ct. at 807-08.

The majority in *Sony* disagreed only on whether the factor was determinative:

> Congress has plainly instructed us that fair use analysis calls for a sensitive balancing of interests. The distinction between "productive" and "unproductive" uses may be helpful in calibrating the balance, but it cannot be wholly determinative. *Id.* at 795, n. 40.

There is no suggestion, in either opinion, that the non-productive nature of the use is entitled to no weight at all, as the majority here held.

Second, the majority erred in ignoring the fact that the manuscript was unpublished. Before the 1976 Copyright Act became effective, unpublished works were protected by common law copyright. At common law, the author clearly had "the exclusive right to the first publication" of his work. *Atlas Mfg. Co. v. Street & Smith*, 204 F. 398, 402 (8th Cir.), *appeal dismissed, Street & Smith v. Atlas Mfg. Co.*, 231 U.S. 348 (1913). It was acknowledged that, in the case of an unpublished work, "any use that others made of it might be unfair." *Fendler v. Morosco*, 253 N.Y. 281, 291, 171 N.E. 56, *reh'g denied*, 254 N.Y. 563, 173 N.E. 867 (1930). *See generally* A. Latman, *Fair Use of Copyrighted Works*, Study No. 14 in *Copyright Law Revision, Studies Prepared for the Senate Committee on the Judiciary*, 86th Cong., 2d Sess. (1960), (*reprinted in* 2 Arthur Fisher Mem. ed. 781, 785 (1963)).

When Congress passed the Copyright Act of 1976, it brought unpublished works under the ambit of Federal protection for

the first time. But Congress also recognized, for the first time, a separate statutory right of first publication. 17 U.S.C. §106(3), H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 62 (1976). And in the legislative history Congress made clear its intent that the distinction between published and unpublished works was a factor to be weighed in the fair use analysis. Thus the Senate report states:

> "The applicability of the fair use doctrine to unpublished works is narrowly limited since, although the work is unavailable, this is the result of a deliberate choice on the part of the copyright owner. Under ordinary circumstances, the copyright owner's right of first publication would outweigh any needs of reproduction for classroom purposes". S. Rep. No. 94-473, 94th Cong., 1st Sess. 64 (1975).

The District Court, in considering the nature of the copyrighted work under Section 107(2), therefore correctly concluded that "[t]he fair use defense is narrowed when the work is unpublished." (C 32). The majority, by ignoring this factor, disregarded both the prior copyright precedent, and the clear statement of Congressional intent.

The errors discussed in this Petition severely distorted the majority's analysis of a copyright case that has received widespread media attention, including a front page article in The New York Times (November 18, 1983, at A1, col. 2) and a lead editorial (November 19, 1983, at A24, col. 1). The errors also prejudicially affected the majority's review of the District Court's conclusion that the use was not fair. Given the facts of this case – the extensive use of expression from an unpublished manuscript, with no contribution by the user, with no benefit to society, and with an adverse economic impact on the copyright owner – the District Court's conclusion that the use was unfair should have been affirmed.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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APPENDICES

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OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 143, 261—August Term, 1983

(Argued September 14, 1983

Decided November 17, 1983)

Docket Nos. 83-7277, 83-7327

HARPER & ROW, PUBLISHERS, INC. and THE READER'S DIGEST ASSOCIATION, INC.,

Plaintiff-Appellees-Cross-Appellants,

—against—

NATION ENTERPRISES and THE NATION ASSOCIATES, INC.,

Defendants-Appellants-Cross-Appellees.

Before:

KAUFMAN, MESKILL, and PIERCE,

Circuit Judges.

Nation Enterprises and The Nation Associates, Inc. appeal and Harper & Row, Publishers, Inc. and The

Reader's Digest Association, Inc. cross-appeal from a judgment of the United States District Court for the Southern District of New York (Richard Owen, *Judge*), awarding damages for copyright infringement under the Copyright Act, 17 U.S.C. §§ 101 *et seq.*, to Harper & Row and the Reader's Digest Association, and dismissing certain state law claims.

Reversed in part; affirmed in part. Judge Meskill dissents in a separate opinion.

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AMERICAN CIVIL LIBERTIES UNION, New York, N.Y.,

ANDREW L. DEUTSCH, New York, N.Y., *of Counsel*, and

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WEIL, GOTSHAL & MANGES, New York, N.Y.,

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KAUFMAN, *Circuit Judge*:

Almost ten years ago, this nation endured a grave threat to its domestic political life. The report of a burglary at Democratic National Headquarters in the Watergate complex of Washington, D.C. led to a historic constitutional confrontation. The President, suspected of involvement in covering up the crime and its partisan origins, pitted his will against the resolve of a Congress endeavoring to discover the true facts. The citizens of this country watched with awe as revelation after revelation

led finally to the first resignation of a President of the United States. This singular event was followed by another equally unprecedented act. Richard M. Nixon, not yet indicted for the commission of any crimes, was pardoned for any offenses by his successor in office, President Gerald Ford.

Reverberations from those shocks to the nation's constitution are still being felt, and this case is another of those repercussions. Two publishers have come before this court to urge that a magazine's use of material contained in the memoirs of Gerald Ford, and concerned in large part with the Nixon pardon, constitutes a violation of the Copyright Act, 17 U.S.C. §§ 101 *et seq.* Harper & Row, Publishers, Inc. and The Reader's Digest Association, Inc. (hereinafter "Harper & Row" and "Reader's Digest," respectively) ask us to affirm the trial court's award of damages to them on grounds the Nation Enterprises and The Nation Associates, Inc. (hereinafter "the Nation") improperly took expression used by Ford in his book, *A Time To Heal*. Because we do not believe it is the purpose of the Copyright Act to impede that harvest of knowledge so necessary to a democratic state, we reverse. The trial court's dismissal of certain state law claims, however, is affirmed. Before turning to the law, we set forth the facts.

I.

If the first notes of this case were sounded during the days of Watergate, its earliest echo was an agreement consummated on February 28, 1977, one month after Gerald Ford had left the White House. At the time, the former President granted Harper & Row and Reader's Digest exclusive rights to publish his yet unwritten mem-

oirs. The book, according to Harper & Row, was to include, among other things, "the circumstances and reasoning surrounding the pardon of Mr. Nixon by Mr. Ford." By the terms of the contract, Ford acknowledged he must help to guard the value of those rights by avoiding participation in any "public discussion of the unique information not previously disclosed" about his career. He therefore agreed "not to disseminate any such information in any media . . . prior to publication." While "spontaneous and brief" comments were not to be considered a breach of contract, the publishing agreement was influential in Ford's later decision not to appear on an NBC television special in which the pardon was to be a central topic.

A professional writer, Trevor Armbrister, was hired to assist Ford in the process of gathering up strands of the past. Material was culled from a variety of sources including numerous interviews with public figures, among them Alexander Haig, Nelson Rockefeller, and Henry Kissinger. In addition, Ford and Armbrister made tape recordings in which the former President recollected both private and public aspects of his life. In February 1979, a first draft was completed by Armbrister. In addition to the information on the pardon of Nixon and events leading up to that historic choice, the book included depictions of Ford's childhood, his extensive career in Congress, his family life, his perceptions of a number of public figures, and the paths he followed after serving as President. Ford reviewed and edited this version of his experiences, and when it was near completion in March of that year, his publishers licensed to *Time* magazine the exclusive rights to print pre-publication excerpts in their issue of April 23rd. *Time* paid $12,500 in advance for this

privilege, and was to pay an additional $12,500 when its edition containing selected segments was complete.

But the resonant note of the past was not yet stilled. In late March 1979, an unidentified person brought a copy of the Ford manuscript to Victor Navasky, Editor of *The Nation*, a magazine devoted in large part to political commentary and news. Mr. Navasky testified, with no contradiction, that he had neither solicited nor paid for delivery of the book. Nor was he aware upon its receipt of *Time*'s pre-publication rights, although he did admit to realizing his temporary possession of the manuscript had not been authorized by Harper & Row or Reader's Digest. Believing the book to contain important political news, including heretofore undisclosed facts on the pardon, Navasky worked frenetically throughout a night and part of a weekend to read the memoirs in their entirety and select material germane to a news article before returning the copy to its source. He also consulted counsel concerning possible copyright violations and was advised that his proposed use was permissible.

On April 3, 1979, in an issue of *The Nation* dated April 9, 1979, the article which is the focus of this suit appeared. Navasky had learned by then of *Time*'s publication plans, although he remained unsure of the precise contents which that magazine intended to excerpt. An ironic detail of the case is that much of the information concerning the pardon turned out to have been already revealed by Ford during the 1974 Hungate Committee investigation of that Presidential decision. Navasky, however, was unaware at the time he wrote that his piece was a hybrid, history to those who knew these facts, news to those who did not. It is enough to add here that the Nation's receipts from newsstand sales were $418.00.

The magazine article, a copy of which is reprinted in the Appendix to this opinion, was approximately 2,250 words in length and was contained in three two-column pages. The manuscript, in comparison, was nearly 200,000 words and covered 655 typed pages. The first three paragraphs in *The Nation* piece summarized the factual highlights and announced the expected publication dates of *A Time To Heal* as well as the advance excerpts in *Time* and *The Reader's Digest*. That introduction was followed by nineteen paragraphs concerning the decision to pardon Nixon. Significant conversations are recorded, including several between then Vice President Ford and Alexander Haig and Ford and various of his associates. Portions of a memorandum written by Henry S. Ruth, Jr., an aide to Special Prosecutor Leon Jaworski, are quoted. In addition, Ford's reasons for the pardon are described, as is the fact that his emotional reaction to Nixon did not influence his choice. Finally, a brief paragraph on Ford's impressions of Nixon, ill with phlebitis following his resignation and pardon, is copied from the book.

The article then recounts information on Ford's relations with Kissinger and several other historically significant episodes, including the seizure of the MAYAGUEZ and Ford's decision to run for a full term as President. That material is followed by four paragraphs in which Ford's perceptions and evaluations of Nixon's character and actions, including Nixon's response to the awesome consequences of Watergate, are portrayed. The article then ends with a reference to the problem of the disclosure of political events like those described in *The Nation*, and mentions the *Washington Post*'s earlier unauthorized publication of excerpts from the memoirs of H.R. Halde-

man, one of Nixon's closest advisors during the Watergate period.

All the information contained in the article dealt with Ford's public and political life. Harper & Row and Reader's Digest describe the material used by *The Nation* as barely disguised paraphrasings or direct thefts of Ford's original expression. The Nation asserts it did no more than relate facts of momentous public import, particularly since Ford and Haig were then considered serious contenders for the 1980 Republican Presidential nomination. It claims it borrowed only the minimum expression essential to lend credibility to the piece. Because these conflicting characterizations of *The Nation* article are at the heart of this case, we return to them in our legal discussion.

On the day *The Nation* article appeared, Mr. Ray Cave of *Time* requested permission to publish the excerpts in its April 16, 1979 issue instead of the April 23rd issue as previously agreed. Because of what its counsel described as a careful program coordinating the *Time* printing and the book's release, Harper & Row refused. As a result, *Time* did not publish any of the manuscript, nor did it pay the additional $12,500. Harper & Row and Reader's Digest then brought this suit against the Nation for copyright infringement and for certain state law violations, including conversion.

The trial judge dismissed the state law claims upon motion, finding them preempted by the Copyright Act, 17 U.S.C. § 301. *Harper & Row, Publishers, Inc.* v. *Nation Enterprises*, 501 F. Supp. 848 (S.D.N.Y. 1980).[1] After a non-jury trial consuming six days, Judge Owen

1 Appellees' later motion to plead a further amended and/or supplemental complaint was denied on the same ground.

held that the Nation had infringed Harper & Row's and Reader's Digest's copyright and had failed to persuade him that they had made a "fair use" of the borrowed material. *Harper & Row, Publishers, Inc.* v. *Nation Enterprises*, 557 F. Supp. 1067 (S.D.N.Y. 1983).

II.

Because the state law claims were disposed of at the outset of this action, we consider those issues before turning to the more troublesome question of copyright infringement.

Harper & Row and Reader's Digest cross-appeal from the order dismissing these claims on grounds they are preempted by the Copyright Act. They urge us to find the Nation liable for conversion and tortious interference with contractual rights,[2] alleged harms arising out of the same facts on which the charge of copyright infringement is based.

The Copyright Act sets out the test for preemption of that state statutory or common law which may conflict with the federal policies embodied in the Act.[3] The

2 In their brief before this Court, cross-appellants curiously include a claim for "injury to the confidential manner in which publishers solicit sales of pre-publication serialization rights" among those dismissed by the district court. That claim was dropped from cross-appellants' complaint by their own amendment, and so was not before the lower court when it ruled on the dismissal motion. It is also not raised as an issue on appeal.

3 The Copyright Act, 17 U.S.C. § 301, states in pertinent part:

(a) On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by section 102 and 103, whether created before or after that date and whether published or

section contains a two-part analysis. First, the work of authorship in which rights are claimed must fall within the "subject matter of copyright" as defined in §§ 102 and 103 of the Act. Cross-appellants do not appear to contest that the Ford memoirs fall within the ambit of federal protection. In any event, the Act clearly embraces "[w]orks of authorship," including "literary works," as within its subject matter. 17 U.S.C. § 102. The fact that portions of the Ford memoirs may consist of uncopyrightable material, an issue discussed below, does not take the work as a whole outside the subject matter protected by the Act. *See* H.R. Rep. No. 1476, 94th Cong., 2d Sess. 131 (1976), U.S. Code Cong. & Ad. News 1976, p. 5747; *Durham Industries, Inc.* v. *Tomy Corp.*, 630 F.2d 905, 919 (2d Cir. 1980). Were this not so, states would be free to expand the perimeters of copyright protection to their own liking, on the theory that preemption would be no bar to state protection of material not meeting federal statutory standards. That interpretation would run directly afoul of one of the Act's central purposes, to "avoid the development of any vague borderline areas between State and Federal protection." H.R. Rep. No. 1476, *supra*, at 130.

The statute also requires that a state law create "legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as

unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.

(b) Nothing in this title annuls or limits any rights or remedies under the common law or statutes of any State with respect to—

* * * * * *

(3) activities violating legal or equitable rights that are not equivalent to any of the exclusive rights within the general scope of copyright as specified by Section 106.

specified in section 106"[4] if it is to be preempted. These include the rights "to reproduce the copyrighted work in copies" and "to prepare derivative works based upon the copyrighted work." When a right defined by state law may be abridged by an act which, in and of itself, would infringe one of the exclusive rights, the state law in question must be deemed preempted. *Oboler and Nostalgia Lane, Inc.* v. *Goldin, et al.*, No. 83-7153, slip op. at 5455 (2d Cir. Aug. 1, 1983); *Orth-O-Vision, Inc.* v. *Home Box Office*, 474 F. Supp. 672, 683-84 (S.D.N.Y. 1979); 1 *Nimmer on Copyright* § 1.01[B] at 1-11 (1983). Conversely, when a state law violation is predicated upon an act incorporating elements beyond mere reproduction or the like, the rights involved are not equivalent and preemption will not occur. *Factors, Etc., Inc.* v. *Pro Arts, Inc.*, 496 F. Supp. 1090, 1099 (S.D.N.Y. 1980), *rev'd on other grounds*, 652 F.2d 278 (2d Cir. 1981), *reh'g denied*, 701 F.2d 11 (2d Cir.), *cert. denied*, 102 S.Ct. 1973 (1983).

4 The Copyright Act, 17 U.S.C. § 106, states as follows:

Subject to sections 107 through 118, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

(1) to reproduce the copyrighted work in copies or phonorecords;

(2) to prepare derivative works based upon the copyrighted work;

(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;

(4) in the case of literary, musical, dramatic, or choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; and

(5) in the case of literary, musical, dramatic, or choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly.

Cross-appellants argue that neither of their state law claims allege rights equivalent to those created by the Act. With regard to the issue of conversion, cross-appellants seem unable to decide how to plead the factual elements supporting their claim. Their amended complaint asserted conversion based on the unauthorized publication of *The Nation* article. In this court, they propound a theory which rests the tort upon the unlawful possession of the physical property of the Ford manuscript. In doing so, they have placed themselves neatly upon the horns of a dilemma. If unauthorized publication is the gravamen of their claim, then it is clear that the right they seek to protect is coextensive with an exclusive right already safeguarded by the Act—namely, control over reproduction and derivative use of copyrighted material. As such, their conversion claim is necessarily preempted.

Alternatively, Harper & Row and Reader's Digest suggest it is the possession of the papers themselves which lays the foundation for their claim. Conversion, as thus described, is a crime involving acts—possession and control of chattels—which are qualitatively different from those proscribed by copyright law, and which therefore are not subject to preemption. Cross-appellants have failed, however, to state a conversion claim. Conversion requires not merely temporary interference with property rights, but the exercise of unauthorized dominion and control to the complete exclusion of the rightful possessor. *Citizens Nat'l Bank* v. *Osetek*, 353 F. Supp. 958, 963 (S.D.N.Y. 1973); *AMF Inc.* v. *Algo Distributors, Ltd.*, 48 App. Div.2d 352, 356, 369 N.Y.S.2d 460, 464 (2d Dep't 1975); 1 F. Harper & F. James, *The Law of Torts* § 2.15 (1956); *cf. Restatement (Second) of Torts* § 222A (1965). Merely removing one of a number of copies of a manuscript (with or without permission) for a short time,

copying parts of it, and returning it undamaged, constitutes far too insubstantial an interference with property rights to demonstrate conversion.[5] *See Pearson* v. *Dodd*, 410 F.2d 701, 707 (D.C. Cir.), *cert. denied*, 395 U.S. 947 (1969). Thus, whatever factual predicate they choose, Harper & Row and Reader's Digest cannot succeed on this ground.

With respect to the claim of tortious interference with contractual relations, cross-appellants' statement of the cause of action in their complaint suggests its infirmity. They allege that cross-appellees have committed a tort "by destroying the exclusive right of an author and his licensed publishers to exercise and enjoy the benefit of the pre-book publication serialization rights." If there is a qualitative difference between the asserted right and the exclusive right under the Act of preparing derivative works based on the copyrighted work, we are unable to discern it. In both cases, it is the act of unauthorized publication which causes the violation. The enjoyment of benefits from derivative use is so intimately bound up with the right itself that it could not possibly be deemed a separate element. *See* 1 *Nimmer on Copyright* § 1.01[B], at n.46 (1983). As the trial court noted, the fact that cross-appellants pleaded additional elements of awareness and intentional interference, not part of a copyright

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5 Interference with the personal property of another which does not rise to the level of conversion may constitute the lesser tort of trespass to chattels. *See Restatement (Second) of Torts* §§ 216-222 (1965). Cross-appellants at one point hinted at such a claim. After Judge Owen dismissed the state law counts in their complaint, they sought permission to make a second amendment adding claims of, *inter alia*, "trespassing upon plaintiffs' rights to its business documents . . . ." *See* note 1, *supra*. Their motion to amend was denied, and the issue has not been raised here. Cross-appellants could not succeed on this claim in any event, since liability for trespass to chattels exists only upon a showing of actual damage to the property interfered with. F. Harper & F. James, *supra*, § 2.3.

infringement claim, goes merely to the scope of the right; it does not establish qualitatively different conduct on the part of the infringing party, nor a fundamental non-equivalence between the state and federal rights implicated. *Harper & Row, Publishers, Inc.* v. *Nation Enterprises*, *supra*, 501 F. Supp. at 853-54; *accord*, *Kamakazi Music Corp.* v. *Robbins Music Corp.*, 522 F. Supp. 125, 137 (S.D.N.Y. 1981), *aff'd*, 684 F.2d 228 (2d Cir. 1982).

We therefore hold that cross-appellants cannot prevail on either of their state law claims, and proceed to an examination of the copyright infringement claim.

III.

The trial court began its opinion on copyright infringement by considering whether *The Nation* article was news reporting and, if so, whether *The Nation* had made a "fair use" of the memoirs. As a result, it did not face, at the outset, the threshold issue whether the material used by the magazine was copyrightable. We commence this part of our discussion, then, by turning our attention to that question, putting aside the matter of "fair use" until we have decided if any use of copyrighted expression did, in fact, occur.

A.

The Copyright Act, enacted pursuant to Article I, § 8, cl.8 of the United States Constitution, protects only original works of authors. 17 U.S.C. § 102(a).[6] The

6 This section reads in pertinent part:

§ 102. Subject matter of copyright: In general

(a) Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories:

(1) literary works;

• • •

statute grants rights not in ideas or facts, but in expression, 17 U.S.C. § 102(b).[7] The Act is thus able to protect authors without impeding the public's access to that information which gives meaning to our society's highly valued freedom of expression. *See* 1 *Nimmer on Copyright* § 1.10[B][2], at 1-72 (1983). Courts have accordingly held that neither news events, *Time Incorporated* v. *Bernard Geis Associates*, 293 F. Supp. 130, 143 (S.D.N.Y. 1968), *citing International News Service* v. *Associated Press*, 248 U.S. 215, 234 (1918), historical facts, *Hoehling* v. *Universal City Studios, Inc.*, 618 F.2d 972 (2d Cir.), *cert. denied*, 449 U.S. 841 (1980), nor facts of a biographical nature, *Rosemont Enterprises, Inc.* v. *Random House, Inc.*, 366 F.2d 303 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967), is deserving of the protection of the Act. *See also Wainwright Securities, Inc.* v. *Wall Street*

7 17 U.S.C. § 102(b) reads:

In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.

One reasonable interpretation of the word "discovery" in the statute is "fact." For example, an historian who learns in his research that a certain event occurred has discovered a fact. *See* 1 *Nimmer on Copyright* § 2.11[A], a 2-157 (1983). The Congressional intent to ensure a free communication of facts and information is explicitly addressed in the House Report which states: "Copyright does not preclude others from using the ideas or information revealed by the author's work." H.R. Rep. No. 1476, 94th Cong., 2d Sess. 56, *reprinted in* 1976 U.S. Code Cong. & Ad. News 5656, 5670.

Transcript Corp., 558 F.2d 91 (2d Cir. 1977), *cert. denied*, 434 U.S. 1014 (1978).[8]

The distinction between fact and expression is not always easy to draw. There are, however, several general principles according to which that boundary may be mapped for works in which much factual material is described. An author's originality exists, in part, in his overall arrangement of facts. The structure he chooses for the work as a whole is important. *See Wainwright Securities, Inc.* v. *Wall Street Transcript Corp.*, *supra*, 558 F.2d at 94, and *Meredith Corp.* v. *Harper & Row, Publishers, Inc.*, 378 F. Supp. 686 (S.D.N.Y.), *aff'd*, 500 F.2d 1221 (2d Cir. 1974). In this case, there can be no concern that this mode of expression was usurped; *The Nation* article drew only upon scattered parts and not the total entity with its unique and protected mosaic.

Harper & Row and Reader's Digest insist, however, that a second expressive mode, the author's chosen language, was taken by virtue of short segments of verbatim quotation and the liberal use of paraphrasing. While we agree some of Ford's literal words were copyrightable,[9] a conclusion to which we will return in our discussion of "fair use," we reject the argument that paraphrasings of disparate facts such as those found in this case constitute an infringement of copyrightable material. The dissent's blanket statement that paraphrasing is the equivalent of copying is simply inaccurate. The cases in which that equation is made differ significantly from this litigation. They concern instances in which an alleged infringer borrowed virtually an entire work and attempted to avoid liability by doing little more than changing the verbatim language or slight details in the structure.[10] The dissent's generalization about paraphrasing is valid when applied to such cases for reasons once stated by Judge Learned Hand:

> It is of course essential to any protection of literary property, whether at common-law or under the statute, that the right cannot be limited literally to the text else a plagiarist would escape by immaterial variations. *Nichols* v. *Universal Pictures Corp.*, 45 F.2d 119, 121 (1930).

If *The Nation* had taken, for example, all of the book or all of a chapter and merely changed the language here and

8 Our brother Meskill, in dissent, takes issue with our discussion of the copyrightability of facts. The comments in the dissenting opinion, however, indicate a confusion between the copyrightability accorded to "compilations" of facts, with which we do not take issue, and the copyrightability of the "preexisting material" or facts making up those compilations. 17 U.S.C. § 103. Each of the cases on which our dissenting brother relies involves a listing of names, nouns, or information. Those listings, qua lists, are indisputably copyrightable as compilations, and nothing in our opinion asserts the contrary. But the preexisting facts contained within those lists are not protected. In short, while acknowledging elsewhere that the effect of the cited "cases is not to provide protection for the facts themselves but for the author's original articulation and presentation," the dissent nevertheless seems to fail to distinguish the protected whole (the "compilation") from its unprotected parts (the "preexisting material"). The result is the inappropriate application of authorities concerning fact compilations to this case involving a literary work which is predominantly factual in nature, as are histories and biographies.

As discussed, *infra*, this confusion, in the dissenting opinion, concerning the copyrightability of facts created further misunderstanding concerning paraphrasing of verbatim language in the dissenting opinion.

9 We say "some" and not "all" because some of Ford's verbatim language consists of statements or conversations of other persons. As we discuss, *infra*, such material is not copyrightable by Ford.

10 In *Donald* v. *Zack Meyer's T.V. Sales & Service*, 426 F.2d 1027, 1030 (5th Cir. 1970), for example, a printed legal "Agreement" was apparently taken from a form book and only slightly reworded. In *Meredith Corp.* v. *Harper & Row, Publishers, Inc.*, 378 F. Supp. 686 (S.D.N.Y.), *aff'd*, 500 F.2d 1221 (2d Cir. 1974), Meredith took an entire textbook and proceeded to "rewrite" it in minor ways to produce another text.

there, paraphrasing would not and should not suffice to protect it.

But that is not this case. Here, *The Nation* drew on scattered pieces of information from different pages and different chapters, and then described that information in its own words. This is precisely the situation to which Nimmer refers in his treatise when he writes:

> What if the defendant has copied neither the plaintiff's word for word form of expression, nor the selection and arrangement of plaintiff's facts, but has nevertheless copied one or more facts which appear in plaintiff's factual work? Here the answer on principle should be that plaintiff cannot establish copyright infringement." 1 *Nimmer on Copyright* § 2.11[E] at 2-164 (1983).[11]

Our dissenting brother's excessively broad generalization about paraphrasing fails to recognize the essential need to strike a definitional balance between the First Amendment and the Copyright Act by permitting the free communication of facts while still protecting an author's expression. A construction of the Act insisting it is impermissible copying to paraphrase discrete facts ignores the unambiguous legislative history which establishes that "information" is not protected. H.R. Rep. No. 1476, 94th Cong., 2d Sess. 56 *reprinted in* 1976 U.S. Code Cong. & Ad. News 5659, 5670. Were information copyrightable as the dissent implies, the Act would clash with the First Amendment on every occasion in which an

11 Nimmer points to a line of cases which have held otherwise on the basis that the author's labor, rather than his writings, are protected by the Copyright Act. 1 *Nimmer on Copyright* § 2.11[E] at 2-166 (1982). The Second Circuit, however, has explicitly repudiated these authorities and that reasoning in *Hoehling* v. *Universal City Studios, Inc.*, *supra*, 618 F.2d at 979.

author chose to put in his own words facts which had already been described by another writer. *See generally* Goldstein, *Copyright and the First Amendment*, 70 Colum. L. Rev. 983 (1970).

Nowhere could the need to construe the concept of copyrightability in accord with First Amendment freedoms be more important than in the instant case. Here we are presented with an article describing political events of major significance, involving a former President of the United States. The paraphrasings concern the very essence of news and of history. In such works, courts have carefully confined that troublesome concept "expression" to its barest elements—the ordering and choice of the words themselves. *See Hoehling* v. *Universal Studios, Inc.*, *supra*, 618 F.2d at 974. Were "expression" in this context given a broader terrain, an individual could be the owner of an important political event merely by being the first to depict that event in words. *See International News Service* v. *Associated Press*, *supra*, 248 U.S. at 234, and Brief for Pen American Center, *Amicus Curiae*, at 21-25.[12]

The trial court, however, would have us accept a novel theory concerning the copyrightability of historical fact and memoranda. It found such material integral to "Ford's revelations as to his state of mind while involved in governmental affairs of the highest consequence." *Harper & Row, Publishers, Inc.* v. *Nation Enterprises*,

12 A comment by Professor Nimmer is particularly relevant to this case. He states: "While freedom of speech generally is not impermissibly abridged by copyright protection for 'expression,' to grant a copyright monopoly to facts as such would constitute an intolerable limitation on First Amendment rights. Would anyone seriously suggest that the Washington Post was deserving of a copyright on the facts of the Watergate incident because its reporters, Woodward & Bernstein, through considerable labor, expense and ingenuity, discovered such facts?" 1 *Nimmer on Copyright* § 2.11[E] at 2-167 (1982).

supra, 557 F. Supp. at 1073. As a result, the court conferred copyright protection on material it admitted was not "*per se* copyrightable." *Id.*, 557 F. Supp. at 1072. The core of the court's reasoning appears to be grounded in its statement that "it is the totality of these facts and memoranda collected together with Ford's reflections that made them of value to the Nation. Correspondingly, it is this same totality that is protected by the copyright laws." *Id.*

Two assumptions seem to inhere in this reasoning. The district court appeared to believe Ford's "revelations as to his state of mind," standing alone, were copyrightable. *Id.*, 557 F. Supp. at 1073.[13] Appellees agree, urging in their brief that this element of the autobiography of a public official is precisely that personal and subjective note which renders it the essence of expression. We need not decide here whether these depictions belong more properly to the sphere of fact or that of expression, for with the exception of a word or two, they are taken verbatim from the book, and the literal words are unquestionably copyrightable. But we note in passing, though it is true these responses did originate with Ford and might

13 The opinion is not explicit about the precise "revelations" to which it is referring. The court had adopted Plaintiffs' Proposed Findings of Fact and Conclusions of Law as its own Supplemental Findings of Fact after excising certain paragraphs, but a list of examples of Ford's "subjective feelings" was one of those portions which was crossed off. Judge Owen's handwritten amendment to these findings, which states: "The fact that certain proposed findings herein are excised does not mean that the Court finds that the record does not support them . . . .", does not answer the inquiry whether those instances were the "reflections" to which the court then referred in its opinion. We will surmise that, at the least, Ford's statements concerning the effects on the pardon decision of his compassion for Nixon, and his philosophy from Yale Law School are included. His mention of "hurt" upon learning that Nixon had not told him the truth may also be such a revelation.

be accurately described as his unique perspective, it seems to defy common sense to declare that the "states of mind" which play a role in the crucial political decisions of public officials are any less "fact" than any act which such an official may choose or not choose to undertake.[14]

Accepting, however, that the verbatim "reflections" in this case are "expression", the district court's second assumption, that their coupling with uncopyrightable fact transformed that information into a copyrighted "totality," is an erroneous construction of the statutory "subject matter." 17 U.S.C. § 102. That conception of the law is tantamount to permitting a public official to take private possession of the most important details of a nation's historical and political life by adding language here and there on the perceptions or sentiments he experienced while in office and insisting the work's entire contents are thereby made his alone by virtue of copyright. The Copyright Act was not intended to provide such a private monopoly of fact at the expense of the public's need to be informed. *Hoehling* v. *Universal City Studios, Inc.*, *supra*; *Berlin* v. *E.C. Publications, Inc.*, 329 F.2d 541 (2d Cir.), *cert. denied*, 379 U.S. 822 (1964).[15]

14 Judge Meskill calls into question our comment concerning "states of mind" as facts. If he means by his statements that a man owns his own state of mind until he writes it down, we agree. If he means that a man owns the "expression" of his state of mind (e.g., the verbatim language), we are also in agreement. If he means, however, that the state of mind itself, when expressed in different words, may not be written down by another without a copyright infringement having occurred, we respectfully disagree for reasons stated in our discussion of the copyrightability of facts and of paraphrase.

15 The dissent attempts to distinguish away our reliance on *Hoehling*, *supra*, by pointing out that the alleged infringer in that case added something original to the historical or biographical information taken. Regardless of the accuracy of this observation, it has nothing to do with the question of the copyrightability of the work from which the facts were gleaned. If any consideration of the originality of *The*

Additional reasons preclude a finding that much of this material is copyrightable. A great deal of the information concerning the pardon decision was presented by President Ford before the Hungate Committee and subsequently printed in a government document. *Pardon of Richard M. Nixon, and Related Matters: Hearings Before the Subcommittee on Criminal Justice of the House Committee on the Judiciary*, 93rd Cong., 2d Sess. at 90-151 (1974). This material was a "work of the United States Government," 17 U.S.C. § 105, and hence not copyrightable.[16] *See also* 1 *Nimmer on Copyright* § 4.04, at 4-17 (1982). No individual can claim such matter as his own. *Greenbie* v. *Nobel*, 151 F. Supp. 45, 66 (S.D.N.Y. 1957).

Moreover, the use of conversations attributed to other persons cannot be a borrowing of copyrighted material, because of the Act's requirement, 17 U.S.C. § 102(a),[17] that an author's work be his own and not originate in others. *See Suid* v. *Newsweek Magazine*, 503 F. Supp. 146, 148 (D.D.C. 1980); *Norman* v. *Columbia Broadcasting System, Inc.*, 333 F. Supp. 788, 798 (S.D.N.Y. 1971).

Nation article is appropriate, and we do not suggest that it is, such observations belong to the discussion of "fair use" of copyrighted material, not to the discussion of whether the historical and political facts described in *A Time To Heal* were copyrightable.

16 17 U.S.C. § 105 states: "Copyright protection under this title is not available for any work of the United States Government . . . ." 17 U.S.C. § 101 defines a "work of the United States Government" as "a work prepared by an officer or employee of the United States Government as part of that person's official duties."

We need not decide here whether § 105 or its predecessor, the former § 8, controls the Hungate Committee material. Under either section, this printed work would not be copyrightable. *See* H.R. Rep. No. 1476, 94th Cong., 2d Sess. 58 (1976).

17 *See supra* n.6.

The same originality criterion applies to the memorandum written by Henry S. Ruth and taken by Trevor Armbrister from a copyrighted book by Leon Jaworski.

Appellants ask us to find that the words Ford spoke when he was in office may not be copyrighted by him as they, too, are "work[s] of the United States Government." 17 U.S.C. § 105. We cannot go so far. The conversations originated with Ford, and, unlike the testimony before the Hungate Committee, were neither fixed as "writings" nor publicly delivered as part of any person's "official duties." 17 U.S.C. § 101. Indeed, it pushes language beyond its common sense bounds to characterize Ford's conversational words as "a work prepared" by him. *Id.* Although another may pluck the facts from unrecorded words uttered by a public official while carrying out his public tasks, the phrasing of the sentence itself may be copyrighted by that official if and when it is later written down.

When the uncopyrighted material is stripped away, the article in *The Nation* contains, at most, approximately 300 words that are copyrighted. These remaining paragraphs and scattered phrases are all verbatim quotations from the memoirs which had not appeared previously in other publications. They include a short segment of Ford's conversations with Henry Kissinger and several other individuals. Ford's impressionistic depictions of Nixon, ill with phlebitis after the resignation and pardon and of Nixon's character, constitute the major portion of this material. It is these parts of the magazine piece on which we must focus in our examination of the question whether there was a "fair use" of copyrighted matter.

B.

The Copyright Act provides two mechanisms by which the rights of a copyholder may be protected without impeding the public's access to information. The first of these devices, the distinction between expression, which is copyrightable, and idea or fact, which is not, has been discussed above. The second means of ensuring a proper balance of the citizenry's need to be informed and the author's monopoly of his original writings is known as the doctrine of "fair use." *See Wainwright Securities, Inc.* v. *Wall Street Transcript Corporation*, *supra*, at 558 F.2d at 94. This common law concept, now embodied in the Copyright Act, permits the limited use of copyrighted material without the author's consent for purposes "such as criticism, comment, news reporting, teaching . . ., scholarship, or research . . . ." The court is required to consider at least four factors in deciding whether a particular use was fair. 17 U.S.C. § 107.[18]

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18 This section of the statute states:

§ 107. Limitations on exclusive rights: Fair use

Notwithstanding the provisions of section 106, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether use made of a work in a particular case is a fair use the factors to be considered shall include—

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

(2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use on the potential market for or value of the copyrighted work.

The trial court characterized its task as deciding "whether the Nation's article was 'news reporting', and, if so, was a 'fair use' of the materials taken." *Harper & Row, Publishers, Inc.* v. *Nation Enterprises*, *supra*, 557 F. Supp. at 1070. We find the court's conclusion that "the piece was not such news, 'hot' or otherwise, as to permit the use," *id.*, 557 F. Supp. at 1072, to be clearly erroneous for several reasons. The testimony of Navasky that his purpose in writing the article was news reporting was uncontradicted. In addition, three expert journalists testified to the news purpose of *The Nation* piece. Even in the absence of such expertise, however, our own examination of this article concerning a new book on the actions of the highest public officials in their official positions leads us to conclude that it must be characterized as the reporting of either news or of recent history. While it is true, as appellees state, that mere allegations of news reporting are insufficient grounds for permitting the copying of the expression in a protected work, this is not a case such as *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977), in which the media made use of someone's "entire [expressive] act" while claiming it was fulfilling a news function. Furthermore, there was no evidence of that "chiseling for personal profit" which led this Court in *Wainwright Securities, Inc.* v. *Wall Street Transcript Corporation*, *supra*, 558 F.2d at 97, to find a claim of news reporting was merely a pretext.

Moreover, a careful reading of the opinion reveals that the district judge decided the piece was not news reporting because it contained insufficient "hot news" to be so classified. The court, in short, substituted its own views concerning the quality of the journalism in *The Nation* article, and then determined that it was not news because it was not good or genuine news. There is no indication in

either the statutory language or the case law that determination of fair use should turn on the question of how well a given purpose was performed. Indeed, this Court has eschewed judicial evaluation of quality in fair use analysis. *Rosemont Enterprises, Inc.* v. *Random House, Inc.*, *supra*. The authority on which the court relied, *Wainwright Securities, Inc.* v. *Wall Street Transcript Corporation*, *supra*, is concerned not with the quality of an alleged news report, but with whether labelling the use of another's financial analyses and predictions "news reporting" was a pretext for usurping a creative effort.

We fully agree with our brother Meskill that courts should be "chary" of deciding what is and what is not news. We fear, however, that he has not followed his own admonition. His dissent proceeds to describe what a news article "might choose to include" and then asserts later in his opinion, that 'legitimate coverage of a news event,' *id.*, will thus contain original material." We are of the view that the recounting of information, without more, would seem to be the very essence of "news reporting." Our main concern, however, is that the task of courts in "fair use" analysis should be understood not as deciding what makes bona fide news, but as examining whether a claim of "news reporting" is false.[19]

Furthermore, our brother Meskill's requirement that legitimate news add original commentary or contain original research sounds distinctly like an assertion that "fair use" turns on the amount of the user's labor. The Second

19 The dissenting opinion's reliance on *Wainwright Securities, Inc.* v. *Wall Street Transcript Corp.*, *supra*, is inapposite. The infringer in that case, the Wall Street Transcript, made use of Wainwright's "financial analyses and prediction." It did not simply report scientific, historical, or financial facts in its own words. In addition, the Transcript's repeated printing of Wainwright's financial analyses differs significantly from *The Nation*'s one-time use.

Circuit has rejected that approach.[20] In *Rosemont Enterprises, Inc.* v. *Random House, Inc.*, *supra*, 366 F.2d at 310, this court wrote:

> It is just such wasted effort [as having to do original research, for example] that the proscription against the copyright of ideas and facts, and to a lesser extent the privilege of fair use, are designed to prevent. *See* Gorman, Copyright Protection for the Collection and Representation of Facts, 76 Harv. L. Rev. 1569, 1584 (1963). *Id.*[21]

Judge Owen then proceeded to dispose of each of the four "fair use" factors which must be considered, 17 U.S.C. § 107. He found the "purpose or character" was that "the article was published for profit." *Harper & Row, Publishers, Inc.* v. *Nation Enterprises*, *supra*, 557 F. Supp. at 1072. But the fact that profit was involved is, without more, legally irrelevant where the work in which the use appears offers some benefit to the public. *Rosemont Enterprises, Inc.* v. *Random House, Inc.*, *supra*, 366 F.2d at 307.

The court's analysis of the second of the factors, the "nature of the copyrighted work," was also faulty, for it ignored the essentially factual nature of the book. No consideration was given to the fact that copyright protection of such works is narrow, *Hoehling* v. *Universal Studios*, *supra*, 618 F.2d at 974. Moreover the court did not examine which portions used by *The Nation* were

20 We have also explicitly rejected that approach in relation to copyrightability. *See* note 11, *supra*.

21 The use by *The Nation* of no more than 300 copyrighted words from a book of approximately 200,000 is not such a "bodily appropriation," *id.*, as would call for an exception to this statement or militate against a finding of "fair use."

deserving of such protection. This approach led to its erroneous conclusions concerning a copyrightable "totality."

The treatment of the third and fourth factor is colored by this erroneous "totality" analysis. The court noted *The Nation* article had used "the heart of the book," a statement based on a finding that material dealing with the Nixon pardon had been taken. *Harper & Row, Publishers, Inc.* v. *Nation Enterprises*, *supra*, 557 F. Supp. at 1072. This conclusion, even if correct, is irrelevant, for the "heart" to which the court makes reference is factual information of great public import, and not the expression or the "analyses and predictions," *Wainwright Securities, Inc.* v. *Wall Street Transcript Corporation*, *supra*, 558 F.2d at 96 which are protected by copyright. The quantitative amount of copyrighted words, some 300 in an article of over 2,250, is insubstantial. The court found "economic impact" because "the effect of *The Nation*'s extensive use of the Nixon pardon material caused the *Time* agreement to be aborted . . . ." *Harper & Row, Publishers, Inc.* v. *Nation Enterprises*, *supra*, 557 F.2d at 1072. But, as we have indicated, almost all that material was uncopyrightable information in which Harper & Row and Reader's Digest may not claim ownership. At the same time, the evidence does not support a finding that it was the very limited use of expression per se which led to *Time*'s decision not to print excerpts. The district court erred, in short, in its analysis of the "fair use" factors.

The copyrightable material used by *The Nation* was, for the most part, either Ford's own words in conversations or his portrayals of Richard M. Nixon. The brief conversational passages are no more than Ford's replies to the statements of others. They lend authenticity to this

politically significant material. The short descriptions of Nixon's character provide the reader with a means of evaluating Ford's estimate of Nixon and his claim that he did not act out of compassion in granting a pardon, thus complementing the reporting of the facts. In sum, the quotations are informative and are neither superfluous or excessive for the article's purpose. We reject the notion that this very limited use of copyrighted words is sufficient "to supersede the use of the original work." *Folsom* v. *Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4909l).

Where information concerning important matters of state is accompanied by a minimal borrowing of expression, the economic impact of which is dubious at best, the copyright holder's monopoly must not be permitted to prevail over a journalist's communication. To decide otherwise would be to ignore those values of free expression which have traditionally been accommodated by the statute's "fair use" provisions. *Wainwright Securities, Inc.* v. *Wall Street Transcript Corp.*, *supra*, 558 F.2d at 95. We conclude, accordingly, that there was a "fair use" of copyrighted material in this case.

IV

We have been asked to examine complex questions concerning the Copyright Act and the memoirs of a public official. Throughout our consideration, we have been guided by our conviction that the statute was not meant to obstruct the citizens' access to vital facts and historical observations about our nation's life. By far the greatest part of the article in *The Nation* was no more than the reporting of information concerning political decisions at the highest level of government. These facts were sown in and gathered from the shared ground of our

country's history. They are the "property of all," *Hoehling* v. *Universal City Studios, Inc.*, *supra*, 618 F.2d at 974. The magazine took a meager, indeed an infinitesimal amount of Ford's original language. We do not believe the Act was intended to chill the activities of the press by forbidding a circumscribed use of copyrighted words, as we have indicated.

Accordingly, we reverse the finding of copyright infringement and the award of damages and affirm the dismissal of Harper & Row's and Reader's Digest's state law claims.

APPENDIX

The Ford Memoirs Behind the Nixon Pardon

In his memoirs, *A Time To Heal*, which Harper & Row will publish in late May or early June, former President Gerald R. Ford says that the idea of giving a blanket pardon to Richard M. Nixon was raised before Nixon resigned from the Presidency by Gen. Alexander Haig, who was then the White House chief of staff.

Ford also writes that, but for a misunderstanding, he might have selected Ronald Reagan as his 1976 running mate, that Washington lawyer Edward Bennett Williams, a Democrat, was his choice for head of the Central Intelligence Agency, that Nixon was the one who first proposed Rockefeller for Vice President, and that he regretted his "cowardice" in allowing Rockefeller to remove himself from Vice Presidential contention. Ford also describes his often prickly relations with Henry Kissinger.

The Nation obtained the 655-page typescript before publication. Advance excerpts from the book will appear in *Time* in mid-April and in *The Reader's Digest* thereafter. Although the initial print order has not been decided, the figure is tentatively set at 50,000; it could change, depending upon the public reaction to the serialization.

Ford's account of the Nixon pardon contains significant new detail on the negotiations and considerations that surrounded it. According to Ford's version, the subject was first broached to him by General Haig on August 1, 1974, a week before Nixon resigned. General Haig revealed that the newly transcribed White House tapes were the equivalent of the "smoking gun" and that Ford should prepare himself to become President.

Ford was deeply hurt by Haig's revelation: "Over the past several months Nixon had repeatedly assured me that he was not involved in Watergate, that the evidence would prove his innocence, that the matter would fade from view." Ford had believed him, but he let Haig explain the President's alternatives.

He could "ride it out" or he could resign, Haig said. He then listed the different ways Nixon might resign and concluded by pointing out that Nixon could agree to leave in return for an agreement that the new President, Ford, would pardon him. Although Ford said it would be improper for him to make any recommendation, he basically agreed with Haig's assessment and adds, "Because of his references to the pardon authority, I did ask Haig about the extent of a President's pardon power."

"It's my understanding from a White House lawyer," Haig replied, "That a President does have authority to grant a pardon even before criminal action has been taken against an individual."

But because Ford had neglected to tell Haig he thought the idea of a resignation conditioned on a pardon was improper, his press aide, Bob Hartmann, suggested that Haig might well have returned to the White House and told President Nixon that he had mentioned the idea and Ford seemed comfortable with it. "Silence implies assent."

Ford then consulted with White House special counsel James St. Clair, who had no advice one way or the other on the matter more than pointing out that he was not the lawyer who had given Haig the opinion on the pardon. Ford also discussed the matter with Jack Marsh, who felt that the mention of a pardon in this context was a "time bomb," and with Bryce Harlow, who had served six

Presidents and who agreed that the mere mention of a pardon "could cause a lot of trouble."

As a result of these various conversations, Vice President Ford called Haig and read him a written statement: "I want you to understand that I have no intention of recommending what the President should do about resigning or not resigning and that nothing we talked about yesterday afternoon should be given any consideration in whatever decision the President may wish to make."

Despite what Haig had told him about the "smoking gun" tapes, Ford told a Jackson, Mich., luncheon audience later in the day that the President was not guilty of an impeachable offense. "Had I said otherwise at the moment," he writes, "the whole house of cards might have collapsed."

In justifying the pardon, Ford goes out of his way to assure the reader that "compassion for Nixon as an individual hadn't prompted my decision at all." Rather, he did it because he had "to get the monkey off my back one way or the other."

The precipitating factor in his decision was a series of secret meetings his general counsel, Phil Buchen, held with Watergate Special Prosecutor Leon Jaworski in the Jefferson Hotel, where they were both staying at the time. Ford attributes Jaworski with providing some "crucial" information—i.e., that Nixon was under investigation in ten separate areas, and that the court process could "take years." Ford cites a memorandum from Jaworski's assistant, Henry S. Ruth Jr., as being especially persuasive. Ruth had written:

> "If you decide to recommend indictment I think it is fair and proper to notify Jack Miller and the White House sufficiently in advance so that pardon action

could be taken before the indictment." He went on to say: "One can make a strong argument for leniency and if President Ford is so inclined, I think he ought to do it early rather than late."

Ford decided that court proceedings against Nixon might take six years, that Nixon "would not spend time quietly in San Clemente," and "it would be virtually impossible for me to direct public attention on anything else."

Buchen, Haig and Henry Kissinger agreed with him. Hartmann was not so sure.

Buchen wanted to condition the pardon on Nixon agreeing to settle the question of who would retain custody and control over the tapes and Presidential papers that might be relevant to various Watergate proceedings, but Ford was reluctant to do that.

At one point a plan was considered whereby the Presidential materials would be kept in a vault at a Federal facility near San Clemente, but the vault would require two keys to open it. One would be retained by the General Services Administration, the other by Richard Nixon.

The White House did, however, want Nixon to make a full confession on the occasion of his pardon or, at a minimum, express true contrition. Ford tells of the negotiation with Jack Miller, Nixon's lawyer, over the wording of Nixon's statement. But as Ford reports Miller's response. Nixon was not likely to yield. "His few meetings with his client had shown him that the former President's ability to discuss Watergate objectively was almost nonexistent."

The statement they really wanted was never forthcoming. As soon as Ford's emissary arrived in San Clemente,

he was confronted with an ultimatum by Ron Zeigler, Nixon's former press secretary. "Let's get one thing straight immediately," Zeigler said. "President Nixon is not issuing any statement whatsoever regarding Watergate, whether Jerry Ford pardons him or not." Zeigler proposed a draft, which was turned down on the ground that "no statement would be better than that." They went through three more drafts before they agreed on the statement Nixon finally made, which stopped far short of a full confession.

When Ford aide Benton Becker tried to explain to Nixon that acceptance of a pardon was an admission of guilt, he felt the President wasn't really listening. Instead, Nixon wanted to talk about the Washington Redskins. And when Becker left, Nixon pressed on him some cuff links and a tiepin "out of my own jewelry box."

Ultimately, Ford sums up the philosophy underlying his decision as one he picked up as a student at Yale Law School many years before. "I learned that public policy often took precedence over a rule of law. Although I respected the tenet that no man should be above the law, public policy demanded that I put Nixon—and Watergate—behind us as quickly as possible."

Later, when Ford learned that Nixon's phlebitis had acted up and his health was seriously impaired, he debated whether to pay the ailing former President a visit. "If I made the trip it would remind everybody of Watergate and the pardon. If I didn't, people would say I lacked compassion." Ford went:

> He was stretched out flat on his back. There were tubes in his nose and mouth, and wires led from his arms, chest and legs to machines with orange lights that blinked on and off. His face was ashen, and I thought I had never seen anyone closer to death.

The manuscript made available to The Nation includes many references to Henry Kissinger and other personalities who played a major role during the Ford years.

On Kissinger. Immediately after being informed by Nixon of his intention to resign, Ford returned to the Executive Office Building and phoned Henry Kissinger to let him know how he felt. "Henry," he said, "I need you. The country needs you. I want you to stay. I'll do everything I can to work with you."

"Sir," Kissinger replied, "it is my job to get along with you and not yours to get along with me."

"We'll get along," Ford said. "I know we'll get along." Referring to Kissinger's joint jobs as Secretary of State and National Security Adviser to the President, Ford said, "I don't want to make any change. I think it's worked out well, so let's keep it that way."

Later Ford did make the change and relieved Kissinger of his responsibilities as National Security Adviser at the same time that he fired James Schlesinger as Secretary of Defense. Shortly thereafter, he reports, Kissinger presented him with a "draft" letter of resignation, which he said Ford could call upon at will if he felt he needed it to quiet dissent from conservatives who objected to Kissinger's role in the firing of Schlesinger.

On John Connally. When Ford was informed that Nixon wanted him to replace Agnew, he told the President he had "no ambition to hold office after January 1977." Nixon replied that that was good since his own choice for his running mate in 1976 was John Connally. "He'd be excellent," observed Nixon. Ford says he had "no problem with that."

On the Decision to Run Again. Ford was, he tells us, so sincere in his intention not to run again that he thought

he would announce it and enhance his credibility in the country and the Congress, as well as keep the promise he had made to his wife, Betty.

Kissinger talked him out of it. "You can't do that. It would be disastrous from a foreign policy point of view. For the next two and a half years foreign governments would know that they were dealing with a lame-duck President. All our initiatives would be dead in the water, and I wouldn't be able to implement your foreign policy. It would probably have the same consequences in dealing with the Congress on domestic issues. You can't reassert the authority of the Presidency if you leave yourself hanging out on a dead limb. You've got to be an affirmative President."

On David Kennerly, the White House photographer. Schlesinger was arguing with Kissinger and Ford over the appropriate response to the seizure of the *Mayaguez*. At issue was whether airstrikes against the Cambodians were desirable; Schlesinger was opposed to bombings. Following a lull in the conversation, Ford reports, up spoke the 30-year-old White House photographer, David Kennerly, who had been taking pictures for the last hour.

"Has anyone considered," Kennerly asked, "that this might be the act of a local Cambodian commander who has just taken it into his own hands to stop any ship that comes by?" Nobody, apparently, had considered it, but following several seconds of silence, Ford tells us, the view carried the day. "Massive airstrikes would constitute overkill," Ford decided. "It would be far better to have Navy jets from the *Coral Sea* make surgical strikes against specific targets."

On Nixon's Character. Nixon's flaw, according to Ford, was "pride." "A terribly proud man," writes Ford, "he detested weakness in other people. I'd often heard him speak disparagingly of those whom he felt to be soft and expedient. (Curiously, he didn't feel that the press was weak. Reporters, he sensed, were his adversaries. He knew they didn't like him, and he responded with reciprocal disdain.)"

Nixon felt disdain for the Democratic leadership of the House, whom he also regarded as weak. According to Ford, "His pride and personal contempt for weakness had overcome his ability to tell the difference between right and wrong," all of which leads Ford to wonder whether Nixon had known in advance about Watergate.

On hearing Nixon's resignation speech, which Ford felt lacked an adequate plea for forgiveness, he was persuaded that "Nixon was out of touch with reality."

In February of last year, when *The Washington Post* obtained and printed advance excerpts from H.R. Haldeman's memoir, *The Ends of Power*, on the eve of its publication by Times Books, *The New York Times* called *The Post*'s feat "a second-rate burglary."

The Post disagreed, claiming that its coup represented "first-rate enterprise" and arguing that it had burglarized nothing, that publication of the Haldeman memoir came under the Fair Comment doctrine long recognized by the courts, and that "There is a fundamental journalistic principle here—a First Amendment principle that was central to the Pentagon Papers case."

In the issue of *The Nation* dated May 5, 1979, our special Spring Books number, we will discuss some of the ethical problems raised by the issue of disclosure.

MESKILL, *Circuit Judge*, dissenting:

I share fully the majority's view that the copyright laws should not be used to impede the public's vital access to information and knowledge. However, in its endeavor to reaffirm the important role of a free press in our democracy, the majority fails to articulate clearly the legal principles on which it relies. Because I believe that a more precise legal analysis leads to a different result here, I must respectfully dissent.

I

The majority concedes that "A Time To Heal" is copyrightable, but refuses to accord it copyright protection because *The Nation* supposedly took "facts" and not "expression" from the work. The majority tries to ascertain whether the contents of certain passages of the memoirs are themselves copyrightable, even though copyright protection is not given to passages but to a work as a whole.

I disagree with the majority's statement that President Ford's description of his state of mind at the time of the Nixon pardon is a fact not entitled to copyright protection. The majority maintains that "states of mind" which play a role in the crucial political decisions of public officials are as much "fact" as any act the official may take. While a person's state of mind is a "fact," his expression of his state of mind is not. Because state of mind is elusive and not susceptible to empirical proof, an author's state of mind is what the author describes it to be. This description may be accurate or a *post hoc* rationalization or downright false, but it is truly the reflection of the author at the time of writing and is therefore expression entitled to protection.

But I will assume *arguendo* that "states of mind" are fact because the majority opinion has a greater flaw. The opinion concludes that because the passages in question contain "facts," paraphrasing these factually-oriented passages cannot constitute copyright infringement. It thus confines its discussion of copyright infringement to "approximately 300 words that are copyrighted."

I do not agree with the majority position that printed facts are never entitled to the protection of the copyright laws. It is no less a copyright infringement to reproduce copyrightable works consisting of "facts" than to reproduce those consisting of "expression." There are many cases which hold that copying of works largely comprised of facts constitutes copyright infringement. *See, e.g., Schroeder* v. *William Morrow & Co.*, 566 F.2d 3 (7th Cir. 1977) (copying of names and addresses of gardening suppliers from plaintiff's listings and descriptions of same held to constitute infringement); *Adventures In Good Eating, Inc.* v. *Best Places To Eat, Inc.*, 131 F.2d 809 (7th Cir. 1942) (infringement to copy restaurant listings); *Quinto* v. *Legal Times of Washington*, 506 F.Supp. 554 (D.D.C. 1981) (infringement to reprint most of article describing perquisites offered by law firms and containing interviews with summer associates, even though article consisted primarily of facts or data in public domain); *Northwestern Bell Telephone Co.* v. *Bedco of Minnesota, Inc.*, 501 F.Supp. 299 (D. Minn. 1980) (infringement to copy and publish information in telephone directory without independent research). *See generally* Gorman, *Copyright Protection for the Collection and Representation of Facts*, 76 Harv. L. Rev. 1569 (1963); 1 M. Nimmer, *Nimmer on Copyright* §§ 2.04[B], 2.11[D] (1983). This Court has acknowledged that verbatim copying of a factual work is actionable as copyright infringement. *Hoehling* v. *Universal City Studios, Inc.*, 618 F.2d 972, 980 (2d Cir.), *cert. denied*, 449 U.S. 841 (1980). Paraphrasing, which is what took place here, is the equivalent of copying for purposes of the copyright laws. *See, e.g., Donald* v. *Zack Meyer's T.V. Sales and Service*, 426 F.2d 1027, 1030 (5th Cir. 1970), *cert. denied*, 400 U.S. 992 (1971); *West Publishing Co.* v. *Edward Thompson Co.*, 176 F. 833, 838 (2d Cir. 1910); *Addison-Wesley Publishing Co.* v. *Brown*, 223 F.Supp. 219, 227-28 (E.D.N.Y. 1963).

Whether there is a copyright infringement simply turns on whether there has been an unlawful appropriation of copyrightable work. In *Meredith Corp.* v. *Harper & Row, Publishers, Inc.*, 378 F.Supp. 686 (S.D.N.Y.), *aff'd*, 500 F.2d 1221 (2d Cir. 1974) (per curiam), Meredith published a textbook on child development which was merely a rewriting and rearrangement of a Harper & Row text in the same field. The Meredith text was held to infringe on the Harper & Row copyright even though the text contained some independent ideas of the author. Similarly, in *Wainwright Securities, Inc.* v. *Wall Street Transcript Corp.*, 558 F.2d 91 (2d Cir. 1977), *cert. denied*, 434 U.S. 1014 (1978), defendant's abstracts of plaintiff's copyrighted[1] financial reports were held to be copyright infringement.

The effect of the above cases is not to provide protection for the facts themselves but for the author's original articulation and presentation of the facts. Copyright laws protect originality. They are meant to safeguard the embodiment in a tangible medium of an author's intellectual labors. *See* 17 U.S.C. § 102(a) (1982); *Higgins* v. *Keuffel*, 140 U.S. 428, 431 (1891). They thus offer protection

1 The term "copyrighted," as used in this dissent, assumes that the copyright is valid.

against a work that is substantially an unoriginal appropriation of the copyrighted work, *i.e.*, "substantially similar." *See Warner Bros. Inc.* v. *American Broadcasting Companies, Inc.*, 654 F.2d 204, 207-08 (2d Cir. 1981) (discussing the "substantially similar" test of copyright infringement). Consequently, while a second author may feel free to use facts that are in the first work, he cannot appropriate expression, method of treatment, emphasis, selection of exact details, or anything else that makes the copyrighted work original. *Wainwright*, 558 F.2d at 95-96.

In the cases relied on by the majority, most notably *Hoehling* v. *Universal City Studios, Inc.*, 618 F.2d 972 (2d Cir.), *cert. denied*, 449 U.S. 841 (1980), and *Rosemont Enterprises, Inc.* v. *Random House, Inc.*, 366 F.2d 303 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967), the allegedly infringing works were original. In *Hoehling*, this Court refused to find copyright infringement where the second author relied on the first work for some facts but wrote his own original account, did a great deal of original research and did not copy or paraphrase any part of the book (although he used some of the same literary devices as did the first author). Similarly, in *Rosemont*, no infringement was found where the second author wrote an original biography, did a substantial amount of original research and copied only a few passages for his 304-page work. These cases are distinguishable from the instant case in which the *Nation* article, almost entirely a paraphrase, was of trivial originality and contained no independent research by the author. Thus, this case has no similarity to *Hoehling* and *Rosemont*; culling language about facts from those cases does not alter the reality that the allegedly infringing works in those cases were original while the *Nation* article was not.

To determine whether the allegedly infringing work appropriates the originality of the protected work, a comparison of both works in their entirety is necessary. Judge Owen's view that the "totality" of the memoirs is protected is not erroneous. Taking into account all of the factors that make a work original, the question of infringement becomes much more a decision to be made on a case-by-case basis than a mechanical determination based on the number of "words that are copyrighted" in the allegedly infringing work. This case-by-case approach is consistent with the prevailing law that determining whether there is "substantial similarity" between two works is a question to be determined by the trier of fact. *See, e.g., Ideal Toy Corp.* v. *Fab-Lu Ltd.*, 360 F.2d 1021, 1022 (2d Cir. 1966).

The majority's fear that an affirmance here would "[permit] a public official to take private possession of the most important details of a nation's historical and political life by adding language here and there . . . ." is unjustified. *The Nation* was perfectly free to use whatever facts were contained in Ford's memoirs as part of its own *original* work. What *The Nation* could not do was compile a work purportedly reporting certain "facts" that did no more than appropriate the same quotes, expressions, selection of language, events, corroboration and recreations that were present in the Ford memoirs and that added nothing original of its own.

Thus, *The Nation*'s paraphrasing of parts of the Ford memoirs constitutes copyright infringement under 17 U.S.C. § 501 (1982) unless it falls within the "fair use" exception.

II

The "fair use" exception, now codified at 17 U.S.C. § 107 (1982), allows certain unauthorized uses of copyrighted material without civil liability if those uses advance social, educational or scientific causes. *See, e.g., Berlin* v. *E.C. Publications, Inc.*, 329 F.2d 541, 544-45 (2d Cir.), *cert. denied*, 379 U.S. 822 (1964). The heart of the fair use doctrine is that a secondary use of an original work may be tolerated if the use has social value or is valuable for the information it disseminates. *See, e.g., Williams & Wilkins Co.* v. *United States*, 487 F.2d 1345 (Ct. Cl. 1973) (large-scale photocopying of medical articles by government research institute and its library), *aff'd by an equally divided court*, 420 U.S. 376 (1975) (per curiam); *Loew's Inc.* v. *Columbia Broadcasting System*, 131 F.Supp. 165, 175-76 (S.D. Cal. 1955) (discussing the use of extensive quotations in reviewing the fair use doctrine), *aff'd sub nom. Benny* v. *Loew's Inc.*, 239 F.2d 532 (9th Cir. 1956), *aff'd by an equally divided court*, 356 U.S. 43 (1958) (per curiam). The fair use doctrine strikes the balance between the First Amendment and the Copyright Act, or between "the public interest in the free flow of ideas and information [and] the copyright holder's interest in exclusive proprietary control of his work." *Roy Export Company Establishment of Vaduz, Liechtenstein* v. *Columbia Broadcasting System, Inc.*, 672 F.2d 1095, 1099 n.9 (2d Cir.), *cert. denied*, 51 U.S.L.W. 3254 (U.S. Oct. 4, 1982). Undoubtedly, the value in ensuring the public's access to knowledge is the reason news reporting exemplifies fair use. Thus, if *The Nation*'s article constituted a dissemination of news it might be protected as a "fair use" of the Ford memoirs.

I agree with the majority that the holding below that the *Nation* article was not news was clearly erroneous. Courts should be chary of deciding what is and what is not news. Certainly there is news value in the fact that a former president of the United States has written a book detailing his state of mind and motivation in pardoning his predecessor. *The Nation* was free to print an article disclosing that fact and describing the book. Some of the things it might choose to include are the publisher's name, publication date, price and topics covered. The fact that an article covers a newsworthy subject or event, however, does not automatically eliminate the author's rights in his literary property. There are limits to what a news article may legitimately take from a copyrighted work.

That the article contains news is only the beginning of the inquiry into whether it constitutes fair use of the copyrighted material. The court must also consider "the amount and substantiality of the portion used in relation to the copyrighted work as a whole." 17 U.S.C. § 107(3) (1982). A news article is only a fair use if it takes what is fair and reasonable for the news story. Otherwise a news publication could with impunity run a story stating that a public figure authored a copyrighted book and then reprint the entire contents of the book. In that situation no one would argue that the newsworthiness of the book would insulate the publisher from civil liability.

Keeping in mind that "fair use" is an equitable doctrine, I believe that the *Nation* article did not constitute a fair use of "A Time To Heal." An article that merely announces the existence of a not-yet-published book and says to the readership, "This is a short abstract of what is in the book," cannot qualify as a fair use. A similar claim

of "news reporting as fair use" was rejected in *Wainwright*:[2]

> Unlike traditional news coverage . . . the Transcript did not provide independent analysis or research; it did not solicit comments on the same topics from other financial analysts; and it did not include any criticism, praise, or other reactions by industry officials or investors. . . . This was not *legitimate* coverage of a news event . . . .

558 F.2d at 96 (emphasis added).

"Legitimate coverage of a news event," *id.*, will thus contain original material. *The Nation* might have corroborated or contrasted Ford's description of the events with other accounts; it might have focused on other statements by Ford to put the memoirs in context; it might even have included a sketch of why the book was important and what effect the events in the book, which occurred almost a decade ago, had on the nation's history. It could also have compared the Ford memoirs to the known record, which one of defendant's experts said "is the big part of the job of a working journalist . . . ." App. at 369 (testimony of F. Friendly). It did none of these. I do not mean to suggest that any of these are the *sine qua non* of a news story, but *The Nation* chose to rely exclusively on the copyrighted Ford memoirs for its story; it added nothing at all original. *Rosemont* counseled that such "extensive verbatim copying or paraphrasing" could not satisfy the fair use standard. 366 F.2d at 310.

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2 In *Wainwright*, we held that defendant's abstracts of plaintiff's financial reports did not constitute a fair use partly because the abstracts were not "legitimate" news reports and partly because they had the "obvious intent . . . of fulfilling the demand for the original work . . . [and constituted] chiseling for personal profit." 558 F.2d at 96-97.

The passage describing Ford's impression of Nixon ill in bed is just one illustration of the article's lack of originality and the unreasonableness of its use of the memoirs. The majority believes that this passage is an insubstantial use of the memoirs that gives the rest of the article credibility. I believe that it is blatant infringement, a direct appropriation of some of the most vivid parts of the book.

Based on *The Nation*'s use of no source other than "A Time To Heal" to write its article and on its use of the exact language in the book in many places, I can only conclude that *The Nation* has used far more of the memoirs than was necessary to write a "news" article. I believe that this conclusion is mandated irrespective of whether the material in the memoirs "concerns matter of great public import." *Cf. Iowa State University Research Foundation, Inc.* v. *American Broadcasting Companies, Inc.*, 621 F.2d 57, 61 (2d Cir. 1980) ("The fair use doctrine is not a license for corporate theft, empowering a court to ignore a copyright whenever it determines the underlying work contains material of possible public importance.") We recently rejected the fair use defense when we accepted the trial court's finding that the amount of the original work used was "so substantial as to be unfairly excessive." *MCA, Inc.* v. *Wilson*, 677 F.2d 180, 185 (2d Cir. 1981). *Cf. Berlin* v. *E.C. Publications, Inc.*, 329 F.2d at 544 (parody does not constitute fair use if borrowed from original "to a far greater degree than that required if the parody is to 'recall or conjure up' that original"). The majority should follow *MCA* and reject the fair use defense in this case.

Furthermore, the fair use defense is negated by the effect of the *Nation* article on the market for the memoirs and for the serialization that *The Nation* knew had been

licensed to *Time* magazine. Unlike the majority, I believe that this case involves the "chiseling for personal profit" that we found in *Wainwright*. 558 F.2d at 97. *The Nation* is a for-profit magazine trying to sell copies and bolster its own prestige. The publisher hoped that the article would sell newsstand copies and generate renewal subscriptions. Although *The Nation*'s newsstand profit was small, it was still profit. The degree of success is irrelevant. The abstract of the *Wainwright* reports by itself probably did not make a great profit for the *Wall Street Transcript* either. *Cf. Iowa State University Research Foundation, Inc.*, 621 F.2d at 61 (that use is for "commercial exploitation" is relevant to, though not determinative of, fair use question) (citing *Meeropol* v. *Nizer*, 560 F.2d 1061 (2d Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978)).

Fair use will generally not be found if there has been a substantial incursion into the market for the primary work. *See, e.g., Meredith Corp.* v. *Harper & Row, Publishers, Inc.*, 378 F.Supp. 686, 689 (S.D.N.Y.), *aff'd*, 500 F.2d 1221 (2d Cir. 1974). It is evident that *The Nation* knowingly invaded the market for the *Time* serialization. Some who read the *Nation* article probably refrained from buying the memoirs or the properly licensed *Time* serialization. *Time* cancelled the second payment to Harper & Row because of the *Nation* article. Irrespective of its stated purpose, *The Nation* knew that it was fulfilling the demand for the *Time* excerpts. *The Nation* thus printed rewritten portions of the copyrighted Ford memoirs without paying for the privilege. *Cf. DC Comics Inc.* v. *Reel Fantasy, Inc.*, 696 F.2d 24, 28 (2d Cir. 1982) (denying fair use defense even though district court found no harm resulted from use defendant did not pay for on ground that licensing for a fee is a benefit of owning a copyright). Fair use should not be found here.

The majority is correct in suggesting that the fair use doctrine is used to reconcile competing claims of freedom of the press and ownership of intellectual labor. But the result reached by Judge Owen does not "threaten press freedom or obstruct the citizens' access to vital facts and historical observations about the nation's life." The publication of the book itself and the other authorized uses of the copyrighted material would satisfy that need. An affirmance would only chill chiseling for personal profit. I would affirm.

OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF N.Y.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

----------X

HARPER & ROW, PUBLISHERS, INC. and

THE READER'S DIGEST ASSOCIATION, INC.,

Plaintiffs,

-against-

NATION ENTERPRISES and THE NATION

ASSOCIATES, INC.,

Defendants

----------X

OPINION AND ORDER
80 Civ. 0856 (RO)

OWEN, District Judge

Defendants Nation Enterprises and The Nation Associates, Inc. publish The Nation which is perhaps America's oldest continuously published weekly magazine. On a day in late March 1979, an undisclosed "source" put The Nation's editor, Victor Navasky, into unauthorized possession of a draft of former President

Gerald R. Ford's memoirs. This draft was the fruit of close to two years work by Ford and his assistant Trevor Armbrister, a senior editor of Readers Digest and himself an author of books.[1] Navasky knew the memoirs were to be published shortly in book form by plaintiffs Harper & Row, Publishers, Inc and The Readers Digest Association, Inc. with certain prepublication rights in Time magazine. However, believing that the draft contained "a real hot news story"[2] concerning Ford's pardon of former President Nixon, as well as lesser news, Navasky spent overnight or perhaps the next twenty-four hour period quoting and paraphrasing from a number of sections of the memoirs. Navasky added no comment of his own. He did not check the material. As he later testified, "I wasn't reporting on the truth or falsity of the

account; I was reporting the fact that Ford reported this. ..." Part of Navasky's rush apparently was caused by the fact that he had to get the draft back to his "source" with some speed.

The Nation article, which appeared on the newstands on April 3, 1979, is somewhat over two thousand words in length, and is set forth hereafter as Appendix A. The major part, as can be seen, details Ford's recital of the events of the pardon of former President Nixon beginning with the time General Alexander Haig, then President Nixon's White House chief of staff, first mentioned a pardon as an option in connection with a resignation, and ending long after the granting of the pardon when President Ford, out of compassion, went to visit the desperately ill ex-President Nixon.

The Nation article also repeats vignettes about Henry Kissinger, John Connally and David Kennerly, a White House photographer. It includes Ford's Presidential reminiscences of Nelson Rockefeller, Ronald Reagan, and Edward Bennett Williams and his recital of the circumstances surrounding his decision to run again for the Presidency. The Nation article closes by relating in some detail Ford's observations of Nixon's character.

The memoirs were shortly thereafter published under the title "A Time to Heal" and were, at the time of The Nation article, protected by copyright.[3] Editor Navasky knew this. The article was therefore an infringement of that copyright, unless otherwise privileged.

The Nation endeavors to justify its use of the material under the "fair use" doctrine[4] on the theory that the content

of the Ford memoirs was "news"[5] - indeed, that aspects of the Nixon pardon were "hot news."

The doctrine of fair use, which emerged through the common law is now codified in the Copyright Act of 1976, 17 U.S.C. § 107. The statute reads:

> Notwithstanding the provisions of Section 106, [17 U.S.C. § 106,] the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include -
>
> (1) the purpose or character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.

Under these guidelines, the inquiry, as I perceive it, is whether The Nation's article was "news reporting", and if so, was a "fair use" of the materials taken.

Even were I to accept defendants' broadest statement of what was "news" in the Nation article, that news would be no more extensive than the following:

MR. NAVASKY: The news, in my judgment, was that President Ford had had a conversation with Alexander Haig that was possibly an impropriety at the highest level of our government because it suggested there was possibly an obstruction of justice[6] in the transaction and in the story, and what was particularly newsworthy, having said that, was that in the book there were documents that Ford quoted from that, as far as I was aware of at the time - I have since discovered that they are in the Congressional Record - were being published for the first time that confirmed his account.

* * *

In addition, the thing that was so striking to me was the written statement that Ford read to Alexander Haig after

his conversations with his aides, saying that he has no intention of recommending what the President should do about resigning or not resigning after they had had a conversation the previous day on that matter.[7] Navasky deposition at 37-9.

At no time did Navasky believe that the rest of the memoirs contained "hot news".[7] Moreover, he was aware that once the book was published there would be no news value in any of the material.[8]

More importantly, it is now conceded even by defendants that the "hot news" revealed in the article was not the revelation that Navasky believed it was when he testified on his deposition. What Navasky on that March day in 1979 thought was "hot news" about the pardon in the Ford memoirs had in fact been the subject of detailed testimony by President Ford in an unusual personal appearance before a Congressional Committee in 1974 which, needless to say,

had been blazoned by the press.[9] Given the foregoing, I conclude that the "revelations" of the Ford memoirs were not such news, "hot" or otherwise, as to permit the use of author Ford's copyrighted material.

Assessing the "fair use" factors, I conclude here, too, that none of them provide The Nation with the absolution it seeks. First, the article was published for profit. Second, the infringed work was soon-to-be-published. Third, The Nation took what was essentially the heart of the book,[10] and fourth, the effect of The Nation's extensive use of the Nixon pardon material caused the Time agreement to be aborted and thus diminished the value of the copyright.[11]

As was stated so simply and effectively by Justice Story in Folsom v. Marsh, 9 F.Cas. 342 (C.C.D. Mass.

1841)(No. 4901), in a case involving one Jared Sparks who published in book form certain official and other papers of George Washington:

> [N]o one can doubt that a reviewer may fairly cite largely from the original work, if his design be really and truly to use the passages for the purposes of fair and reasonable criticism. On the other hand, it is as clear, that if he thus cites the most important parts of the work, with a view, not to criticize, but to supersede the use of the original work, and substitute the review for it, such a use will be deemed in law a piracy.
> 9 F.Cas. at 344-45.

Upon the failure of their fair use defense, defendants are left with one final contention. The Nation asserts that three categories of materials in the Ford memoirs are not copyrightable: (1) the recitals of historical facts, (2) the texts of government memoranda prepared by individuals other than Ford, and (3) the quoted conversations of persons other than Ford. The Nation

contends now that given the non-copyrightability of these materials, its taking of copyrightable material was of such modest compass as to be excusable under the law.

Without question, defendants are correct in their assertion that the historical facts and the memoranda prepared by others are not per se copyrightable by President Ford. However, these facts and memoranda were of interest to The Nation only to the extent that The Nation could set forth Ford's views about them or the manner in which Ford said his life had been affected by them. The Nation certainly had no interest in presenting these historical facts and memoranda in isolation. Rather, it is the totality of these facts and memoranda collected together with Ford's reflections that

made them of value to The Nation. Correspondingly, it is this same totality that is protected by the copyright laws.

This principle governs the portions of Ford's memoirs reciting the statements of individuals other than Ford as well. I decline to enter the thicket of deciding which statements were exact quotations - and therefore not protected by copyright[12] -- and which were merely reconstructions of statements pieced together by Ford -- and therefore copyrightable.[13] I suspect that most were to some degree reconstructions. Suffice it to say that, simply viewed, I regard the historical facts, memoranda, and statements as integral and necessary components of the context of Ford's revelations as to his state of mind while involved in governmental affairs of the highest consequence.

Finally, plaintiffs request an award of their attorney's fees incurred in prosecuting this action. While this might be an appropriate situation for the award of fees, I am constrained by statute to disallow the application.[14] Under the Copyright Law, set forth in the footnote, an award of fees is not available where memoirs, which have not yet been published, have been copied. I note from the legislative history of § 412 that Congress sought to induce authors to register works for copyright -- and thus made them available to the public at large -- by making the remedy of attorney's fees available to one who has published and registered for copyright and, on the other hand, denying it to one who has not. Congress, in §412(2), did envision - and provide for - the unusual situation where "newsworthy

or suddenly popular works may be infringed almost as soon as they are published, before the copyright owner has had a reasonable opportunity to register his claim." Notes of Committee on the Judiciary, House Report No. 94-1476. Congress did not, however, apparently envision the even more unusual situation where an author, who is about to publish and register, has had a draft wrongfully copied. I believe the statute's denial of the remedy of fees to an author or his assigns in such a situation was an oversight in view of the legislative purpose underlying §412. However, the statute is unambiguous and consideration of an award of attorney's fees in this situation is foreclosed.

Given the foregoing, I conclude that The Nation has infringed the plaintiffs' copyright without justification. The

plaintiffs are awarded the $12,500 they were damaged by Time's non-performance, and such further amounts as may be found to be profits in an accounting before a Magistrate of this Court who shall hear and report thereon. Plaintiffs are awarded costs and disbursements. Attorney's fees are denied. In addition to the foregoing findings of fact and conclusions of law, the plaintiffs' heretofore-submitted detailed findings and conclusions are herewith signed.

So ordered.

Dated: February 16, 1983
New York, New York
/s/ Richard Owen
United States District Judge

FOOTNOTES

1 The preparation involved not only consideration of a "mountain" of documents, but interviews with numerous third-parties. The Ford-Armbrister dialogues and third-party interviews, transcribed from tape recordings, ran over 6,000 pages.

2 Navasky deposition at 36.

3 There is no dispute that this is a literary work, 17 U.S.C. §102(a)(1), and that the publishing agreement between Ford and plaintiffs was appropriately recorded, 17 U.S.C. §205(d).

4 The Nation further urges that it was justified in publishing the article notwithstanding copyright, by reason of certain rights under the First

Amendment. While there may be a circumstance in which the First Amendment provides a defendant with greater protection than the fair use doctrine, this is not, in my judgment, one of them. Thus my inquiry is limited solely to the applicability of the doctrine of fair use. Roy Export Co. v. Columbia Broadcasting System, Inc., 672 F.2d 1095, 1099 - 1100(2d Cir. 1982).

5 In this regard Navasky, subsequent to the publication of the article, acknowledged that he had been mistaken as to the "news" aspect of this information. This mistake was caused by his failure to ascertain all that had been revealed in the Congressional hearings in 1974. It is obviously no excuse for a copyright violation that an editor does not remember that something

has been front page headlines. I also note that, according to one of The Nation's own witnesses, a failure to check is poor journalism. Cf., Time, Inc. v. Firestone, 424 U.S. 448(1976)(wherein the Supreme Court in a defamation action held a publisher to a duty of due care in checking the factual accuracy of certain statements made about a private figure.)

6 This theory, as Navasky acknowledged on the trial, was sheer speculation. The colloquy went as follows:

> THE COURT: But the fact that was revealed in 1974 was that he had the conversation with Haig, and Haig left without getting any response. That's where you say you saw the potentiality of an obstruction of justice.

MR. NAVASKY: That's correct...

THE COURT: That, too, is an undisputed fact. The only question that is open is in the meantime whether or not he, on his own, or he, at the suggestion of some aide came to the view that the phone call to Haig should be made.

Now, I am saying to you what difference does it make whether on his own he came to that view or whether some aide called it to his attention and said, "Mr. Vice-President, you better disavow this because the implications are ones that are troublesome."

What's the difference?

MR. NAVASKY: . . .I think the difference is that there is a third possibility which you haven't mentioned.... There is the

possibility that this second conversation, after talking to his aides, was made for the record pro forma so that he could say he put in that there was no deal when in fact there may have been a third phone call to General Haig, which none of us know about, or a private conversation with General Haig saying for the record I am going to read you this statement but you go ahead and proceed as planned.

Now, I raise that third possibility, and I did not raise it in the article because it's remote enough so I didn't feel comfortable. I did not have a chance to go back to the record -

THE COURT: And you have no evidence?

MR. NAVASKY: I have no

evidence, except I have the statements of these three aides which to me - I was as troubled by them as they were troubled by Ford's silence -- and to me that is appropriate news in the politics of 1979, because you have two candidates for the Presidency of the United States who might have been involved in a deal, and you, your Honor, don't accept this as proof that they are involved in a deal, I don't invoke it as proof that they were involved in a deal, but I do see it as raising the possibility that they were in a newsworthy enough context that I reported it.

THE COURT: Can I ask you whether it occurred to you that equally with your theory it was entirely possible that Ford was

thunderstruck at what Haig said to him and was frankly just sitting there listening, taking it in?

MR. NAVASKY: Your Honor, it did --

THE COURT: And after Haig had walked out he then began to assess the pieces and put them together. Is that entirely possible?

MR. NAVASKY: That is entirely possible. Trial transcript at 508-12

7 Navasky deposition at 83-4.

8 Navasky deposition at 48-9.

9 At the trial, Navasky asserted that the "hot news" in his article was (1) that an aide of Ford pointed out to him the risk of not responding to Haig's "pardon option" and (2) that Ford's

subsequent response to Haig over the telephone was read from a written statement. It had become clear by this time that what he had believed in March, 1979 was "hot news" was not. The following is illuminative.

> THE COURT:...Starting with your deposition, you are asked, I take it, why in writing the story you say that the account of the Nixon pardon contains significant new detail which obviously made it newsworthy, right?
>
> MR. NAVASKY: That's right.
>
> THE COURT: At your deposition, at pages 86 and 87, you are asked what was the new detail. You recite that the new detail is: one, the Ruth memorandum; two, the statement Ford read over the phone to Haig; and three, the fact he hadn't told

Haig he thought it would be improper to offer to pardon Nixon in exchange for Nixon's resignation at the time they had the original discussion.

> Those are the three new details that you said when questioned on April 3, 1981 were those that you regarded as newsworthy. What [plaintiffs' counsel] is saying to you, and I gather you acknowledge, that each of those new details was in fact revealed somewhere: The Ruth memorandum in the Jaworski book; the statement to Haig in the Hungate hearings; and the conversation with Haig earlier, also in the Hungate hearings.
>
> So we are at the point where in fact none of these revelations are in fact new because they have all been revealed somewhere. They were

new, perhaps to you, but they were not new in the journalistic view. Right?

MR. NAVASKY: That is true, your Honor.

Trial Transcript at 488-89.

The Nixon pardon material was the very part for which Time was willing to pay $25,000.

The Nation observes that, notwithstanding the publication of its article, Time was still willing to publish had plaintiffs been willing to let Time advance the date of publication one week. Plaintiffs, however, declined on the ground that it made the interval between the Time publication and the book being available in the stores too long.

As Irwin Gilkes, then with Harper & Row, testified:

> [I]f the period of time between the publicity of the book and the availability of the book is too long, and this is extremely delicate and very much a question of one's judgment and sense of the book itself, if that time is too long, then the public when the book appears in the book stores feels that, well, I know all about this, this is really no reason to spend $13.95 or whatever, to read the book, because there has been so much written about it that all the best parts are things I know about already, and well, there is a sort of psychological set that gets on with whatever has happened since, something newer, since we are always

bombarded with something newer.

Trial Transcript at 142.

This position does not seem to be unreasonable, and I therefore decline to second-guess plaintiffs' business judgment in this regard on the basis of expert testimony to the contrary proferred to me by The Nation.

12 Rokeach v. Avco Embassy Pictures Corp., 197 U.S.P.Q. 155 (S.D.N.Y. 1978).

13 Harris v. Miller, 50 U.S.P.Q. 306(S.D.N.Y. 1951).

14 Pursuant to the Copyright Act of 1976, 17 U.S.C. § 412, "no award of statutory damages or of attorney's fees, as provided to sections 504 and 505, shall be made for -- (1) any infringement

of copyright in an unpublished work commenced before the effective date of its registration....

Plaintiffs have also applied for attorneys' fees on the common law basis set forth in such cases as Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240(1975) and Browning Debenture Holders' Committee v. DASA Corp., 560 F.2d 107 (2d Cir. 1977). Although such fees may be awarded in copyright actions where a party has conducted litigation in bad faith, this is not such a case.

Appendix A to District Court Opinion - the Nation Article - is not reproduced here but is reproduced as an appendix to the Court of Appeals opinion, and as a part of Appendix E to this Petition for Certiorari.

SUPPLEMENTAL FINDINGS OF FACT AND CONCLUSIONS OF LAW, UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF N.Y.

Appendix C

Appendix C is a retyped version of the District Court's Supplemental Findings of Fact and Conclusions of Law.

The original of this document consists of Plaintiffs' Proposed Findings of Fact and Conclusions of Law, containing the District Court's handwritten notations indicating the adoption by the District Court of certain of the proposed findings and conclusions, and the excision of certain others.

In this appendix, proposed findings and conclusions excised by the District Court have not been reproduced. Excisions of an entire paragraph are indicated by the fact that the paragraph number does not appear. Excisions within a paragraph are indicated by three asterisks.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

HARPER & ROW, PUBLISHERS, INC. and THE READER'S DIGEST ASSOCIATION, INC.

Plaintiffs,

-against-

NATION ENTERPRISES and THE NATION ASSOCIATES, INC.,

Defendants.

----------x

FINDINGS OF FACT AND CONCLUSIONS OF LAW SUPPLEMENTAL TO OPINION OF FEBRUARY 16, 1983

Civil Action No. 80 Civ. 0856 (RO)

THE COURTS SUPPLEMENTAL FINDINGS OF FACT*

Parties

1. Plaintiff Harper & Row is a Delaware corporation with its principal place of business at 10 East 53rd Street,

*The fact certain proposed findings here are excised does not mean that the Court finds that the record does not support them, but merely that the Court regards them as unnecessary in light of the opinion herein, or otherwise.

New York, New York. Plaintiff Reader's Digest is a Delaware corporation with its principal place of business in the Town of New Castle, New York.

2. Defendant Nation Enterprises is a New York limited partnership with its principal place of business at 72 Fifth Avenue, New York, New York. Defendant Nation Associates, Inc., is a New York corporation with its principal place of business at 72 Fifth Avenue, New York, New York. (PTX 27; PTX 33, Navasky Dep. at 7).*

*The following abbreviations are used in these Proposed Findings of Fact and Conclusions of Law:
PTX ___ - Plaintiffs' trial exhibit ____
DTX ___ - Defendants' trial exhibit ____
TR. ___ - Trial Transcript at the page indicated
Dep. at ___ - Deposition transcript at the page indicated

3. Plaintiffs Harper & Row and Reader's Digest are publishers of various books. Reader's Digest is also the publisher of the Reader's Digest magazine. (Armbrister, TR. 14; PTX 3 and 6).

4. Defendant Nation Enterprises is the publisher of the weekly magazine the Nation and defendant Nation Associates, Inc. is the copyright owner of such magazine. (PTX 10, 27; PTX 33, Navasky Dep. at 7).

5. By letters dated December 8, 1980, November 30, 1980 and June 25, 1982, former President Ford, his assistant, Trevor Armbrister, and Time, Inc. respectively, agreed to be bound by the outcome of this litigation (PTX 24, 25 and 26). Former President Ford also agreed that Harper & Row and Reader's Digest would protect his rights and

interests under the publishing agreement. (PTX 25). Defendants have also withdrawn their Third Affirmative Defense which had alleged the necessity under Rule 19 Fed.R.Civ.P. of making former President Ford and Mr. Armbrister parties to this action. (TR. 254).

Preparation of President Fords Memoirs

6. On February 28, 1977, former President Gerald R. Ford entered into a publishing agreement with the two plaintiffs in this action, Harper & Row and Reader's Digest. The contract called upon President Ford to prepare his memoirs and to deliver a manuscript to Harper & Row and Reader's Digest by January 2, 1979. (PTX 6).

7. President Ford granted Harper & Row and Reader's Digest the sole and exclusive right to publish and sell the

memoirs in book form in the English language, and the sole and exclusive right to license subsidiary rights to the memoirs, including the right to publish portions of the memoirs in newspapers or periodicals prior to the publication in book form. (Id., ¶¶ 2 and 10).

Harper & Row and Reader's Digest was duly recorded on November 19, 1979 in the United States Copyright Office in compliance with Section 205(d) of the Copyright Act of 1976, 17 U.S.C. §§ 101 et seq., Pub. L. No. 94-553 (the "Copyright Act"). (PTX 6 and 7).

9. President Ford hired Trevor Armbrister to assist him in preparation of the memoirs. By the terms of Armbrister's employment, President Ford was to be the sole owner of the copyright and literary rights, as well as of all materials resulting from the process of

writing the book. (PTX 17, May 10, 1977 agreement between President Ford and Trevor Armbrister; Armbrister, TR. 24). The work started shortly after the date of the publishing agreement and continued unabated for approximately a two year period. (Armbrister, TR. 18; Proposed Findings ¶¶ 10-20). Both President Ford and Trevor Armbrister spent extensive time in this effort.

10. When Trevor Armbrister met President Ford, he advised that the memoirs be as informal as possible and should rely not on documents but on conversations. (Armbrister, TR. 19, 22). Mr. Armbrister felt the memoirs should be very human and should reflect as best as possible the human side of President Ford's administration. (Id. at 22). Those suggestions were accepted by President Ford and were reflected in the

procedures described below which were followed in the preparation of the book.

11. President Ford himself had interviews with Trevor Armbrister on more than 200 occasions between April 1977 and February 1978. (Armbrister, TR. 25-31; PTX 14, Ford Dept. at 28). These interviews took place in April and May 1977, in the summer of 1977, in September 1977 and then again from November 1977 through January 1978. (Armbrister, TR. 25-31).

12. All of the interviews were taped and transcribed, resulting in 3,600 typed pages, legal size, of transcript. (Armbrister, TR. 29).

13. The time spent in preparing for these interviews was also extensive. Prior to the first interview, Trevor Armbrister spent two to three weeks going through the files at Reader's Digest

collecting and photocopying a mountain of material: every article from the Reader's Digest files about President Ford and his Presidency. (Armbrister, TR. 24-25).

14. During the interviewing process, Trevor Armbrister and President Ford generally met seven days a week. For each two to three hours spent in interviewing, Trevor Armbrister spent an additional five to eight hours preparing for interviews. (Armbrister, TR. 26). President Ford prepared for the interviews by drafting word portraits of major figures and preparing essays. (Armbrister, TR. 33-34). The word portraits included every living statesman and most members of Congress. (Id.) For example, President Ford spent considerable time delineating his perception of President Nixon's character. (Id. at 57). This portrait

was among the sections subsequently copied from the then-unpublished manuscript by the Nation. (Armbrister, TR. 119-20).

15. The factual research for the preparation of the book also included extensive interviews by Trevor Armbrister with numerous other people who were involved in one way or the other in the events covered in President Ford's memoirs. This included interviews with Alexander Haig, Nelson Rockefeller, Henry Kissinger, President Ford's aides, and others. (Armbrister, TR. 29). These interviews were also taped and transcribed and resulted in 2,600 typed pages of transcript, legal size. (Id.).

16. After completing the interviews, Trevor Armbrister visited the Ford Library in Ann Arbor, Michigan (Armbrister, TR. 29-30) to see if there

were any documents relating to the President's accession to office in August 1974. Trevor Armbrister was looking, among other things, for any material related to the pardon, but did not find any such documents. (Armbrister, TR. 30; PTX 16, at 3). In addition, Armbrister ascertained that Ford had not kept a diary of his days in office. (Armbrister, TR. 35).

17. Trevor Armbrister began preparing the manuscript in May 1978, and completed the first draft in February 1979. (Armbrister, TR. 37, 42).

18. The initial draft prepared by Trevor Armbrister was edited by Reader's Digest personnel in Washington and New York and a retyped version was then sent to President Ford. (Armbrister, TR. 41).

19. President Ford reviewed the manuscript and his comments were

incorporated in a new typescript version. (Armbrister, TR. 44). Three additional editing sessions occurred involving President Ford, Trevor Armbrister as well as others. These sessions included a complete word-for-word review of the new typescript, an additional word-for-word review of the galleys, and still another word-for-word review of the page proofs. (Armbrister, TR. 43-46). President Ford went over each draft of the manuscript personally, and made many changes in each draft. (PTX 14, Ford Dep. at 55). President Ford's changes in the galleys in March 1979 were so extensive that one of the editors described it as a "rewriting," and commented that "[e]ntire sections have been either reworded, changed, deleted or simply added to." (PTX 38, 39; Glikes, TR. 163-68).

20. As Trevor Armbrister testified, his role, as editor, was to draw from President Ford his memory, experiences and perspective on events. (Armbrister, TR. 125). The author and his assistant intended that by interviewing President Ford, Mr. Armbrister was, in effect, getting the former president's words on paper. (Id. at 123). Using President Ford's actual words as much as possible, Trevor Armbrister's next task was to arrange his words in an order and such a manner that an effective book would flow from that. (Armbrister, TR. 39, 123). President Ford then reviewed the manuscript and edited it so that ultimately he could say that these were his words and this was his autobiography. (Armbrister, TR. 124-25). President Ford was the final judge of what was to be included in his memoirs, and regarded

them, in all respects, as the product of his own efforts, his own supervision, and his own knowledge of the facts involved (PTX 14, Ford Dep. at 55,28).

The Publishing Agreement with Harper & Row and Reader's Digest

21. An exhibit to the publishing agreement stated that the major portion of the memoirs would "describe in close personal terms Mr. Ford's experiences when he became Vice-President, and then President, of the United States. Within the bounds of good taste and personal loyalties, this account will present significant hitherto unpublished material about (1) Mr. Ford's relationship with former President Nixon, including Mr. Nixon's reactions to the crisis arising from the Watergate break-in; (2) the circumstances and reasoning surrounding the pardon of Mr. Nixon by Mr. Ford; and

(3) Mr. Ford's reflections on this period of history, and the morality and personalities involved." (Exhibit A to PTX 6).

22. In the contract, President Ford also acknowledged that "the value of the rights granted to Publisher hereunder would be substantially diminished by Author's public discussion of the unique information not previously disclosed about Author's career and personal life which will be included in the Work, and Author agrees that Author will endeavor not to disseminate any such information in any media, including television, radio and newspaper and magazine interviews prior to the first publication of the work hereunder. Spontaneous and brief statements by Author in response to reporters shall not be considered a breach of the foregoing provision." (PTX

6, ¶ 20(b)). President Ford, in fact, during interviews and speeches, responded to press and audience questions about the pardon. (PTX 14, Ford Dep. at 16).

23. While in office, President Ford had testified concerning the pardon before a Subcommittee of the House Committee on the Judiciary under Congressman Hungate. (PTX 14, Ford Dep. at 16; PTX 15; 49; 50). President Ford understood that the above plan for maximizing the appeal of his book meant that the additional information he had agreed not to disclose until book publication was his subjective feelings and his personal discussions with his wife and others. (PTX 14, Ford Dep. at 17). Essentially the book added the more intimate, the more personal, the more subjective feelings that went through President Ford's mind from the time that

the pardon became a possibility. (Id. at 18). The process involved in "the writing of the book", and the "thoughtful preparation" this entailed, enabled Mr. Ford to bring forth these more intimate aspects of his experiences. (Id. at 59; 60).

24. Harper & Row also understood that the book would not contain sensational revelations, that it was going to be the President's memoirs of his thoughts and feelings of the events he participated in, and that it was the President's words and interpretation of the events that was likely to be unique. (Glikes, TR. 173).

The License Agreement with Time, Inc.

26. By mid-March 1979, work on the memoirs was nearing its completion. The manuscript was in galleys at the time. (PTX 38). Bound books would be ready for

shipment on April 24 or 25. (Glikes, TR. 144).

27. On March 14, 1979, Harper & Row and Reader's Digest entered into an agreement with Time, Inc. granting Time the right to publish excerpts, not to exceed 7,500 words, from Chapters 1 and 3 of President Ford's memoirs, dealing with Nixon's resignation and pardon. (PTX 9). The contract provided that the excerpts would appear in the issue of Time dated April 23, which was scheduled to go on sale at newsstands on April 16. (PTX 9; Glikes, TR. 136-37). The contract also included an amendment requiring that Time submit its proposed article to the publishers seven days before the issue was to go on sale. (PTX 9, amendment of March 28, 1979, ¶ 2(a)).

28. The contract provided for a total payment of $25,000, of which

$12,500 was payable upon signing and $12,500 was payable upon the publication of the excerpts. (PTX 9).

29. The contract also provided that the rights granted to Time were exclusive, that each party would make reasonable efforts to keep the contents of Chapter 1 and 3 secure, but that any publication of material from Chapters 1 and 3 prior to or simultaneous with publication by Time would require Harper & Row and Reader's Digest, upon Time's request, to renegotiate in good faith the second payment. (PTX 9). Maintaining exclusivity of the manuscript was a foremost consideration in the view of Time. (PTX 40, Cave Dep. at 14).

30. Plaintiffs undertook to keep the manuscript confidential. Plaintiff Harper & Row's subsidiary rights department required all those to whom the

manuscript was shown to sign an agreement to keep the manuscript confidential. (Glikes, TR. 162-63).

Copyright Office Registrations

31. Copyright registration for the unpublished manuscript of "A Time to Heal" was obtained in the name of Gerald R. Ford from the United States Register of Copyright on August 24, 1979 (PTX 2, Certificate Nos. TXU 26-776 and CA TXU 42-204).

32. Copyright registration for the hardcover book "A Time to Heal" was obtained in the name of Gerald R. Ford on August 24, 1979. (PTX 4, Certificate No. TX 306-737).

The Nation Publication

33. Towards the end of March 1979 Mr. Navasky, the Editor of the Nation Magazine, published by the defendants in this action, received a copy of the

typescript of President Ford's memoirs. (Navasky, TR. 435-36). Mr. Navasky understood at that time that the person who gave him the copy was not authorized to give it to him. (Id. at 437). He also knew it was a "rare event" to receive a manuscript without the author's or publisher's permission. (Id. at 473).

34. Working over a weekend, Mr. Navasky decided to rush into print with an article based upon the memoirs. Mr. Navasky spent about 6 to 10 hours reading the manuscript and another 6 to 10 hours writing the article. (Navasky, TR. 439-40). The article, appearing in the issue dated April 7, 1979, apparently reached the newsstands on April 3, 1979 and came to the attention of Time and Harper & Row on that date. (Glikes, TR. 137-38; PTX 31A and 31B).

36. The article was derived almost exclusively from the memoirs. The only contributions by Mr. Navasky were the inclusion of some information concerning the publication schedule of the book and of the Time excerpts, a few transition sentences, and three concluding paragraphs in which Mr. Navasky stated that the May 5, 1979 issue of the Nation would deal with the "ethical problems" raised by his publication. At his deposition, Mr. Navasky aptly characterized his contribution as "invisible." (PTX 33, Navasky Dep. at 125).

The Effect of the Publication of the Nation Article

38. As a direct result of the publication in the Nation, Harper & Row and Reader's Digest lost the benefit of the contract with Time, Inc.: (1) the

excerpts from Chapters 1 and 3 did not appear in the April 23 issue of Time as had been agreed, and (2) Harper & Row and Reader's Digest did not receive the second payment of $12,500 which they would otherwise have been entitled to receive pursuant to the contract. (Glikes, TR. 151-52).

41. The position of Harper & Row and Reader's Digest on refusing to advance the publication date was a reasonable exercise of business judgment and consistent with the position that they had taken with Time a month earlier. At that point, Time had also asked to run the excerpts one week early, and Harper & Row had refused to give permission to such advance publication. This decision was made before the appearance of the Nation article. (Glikes, TR. 156; PTX 35; Seaver, TR. 321).

42. Since Harper & Row and Reader's Digest were unwilling to allow publication by Time earlier than the agreed upon date, Time decided not to publish at all and refused to renegotiate or to make the final payment of $12,500 called for by the contract. (Glikes, TR. 151-52; PTX 40, Cave Dep. at 20-22, 34-35; PTX 31B).

43. Shipments of the book "A Time to Heal" commenced on April 24 or April 25, 1979. (Glikes, TR. 144, 184, 205). The official publication date was June 6, 1979. (PTX 4).

Certain Fair Use Considerations

44. The article in the Nation asserted that President Ford's 1979 account of the Nixon pardon contained "significant new detail" on the negotiations and considerations that surrounded the pardon, and implied that

one of those significant new details was a conversation, before Ford became president, between President Ford and Alexander Haig at which the idea of a pardon for Nixon was raised. (PTX 10, 21). Actually, however, President Ford's meeting with Haig and the inclusion in their discussions of Haig's reference to the possibility of a pardon for former President Nixon should Ford become President, were not new details but had been disclosed in President Ford's 1974 Hungate testimony. (PTX 15, at 342-43, 344). Mr. Navasky has conceded that the Haig conversation was not news in the sense that it was on the record before. (Navasky, TR. 488-89; 504; 512).

45. The story of President Ford's discussion with Alexander Haig was covered extensively, both in the press and in books concerning Watergate. The

New York Times of October 18, 1974 featured a banner headline dealing with President Ford's testimony before the Hungate Subcommittee. Alexander Haig's reference to a pardon was covered on the first page of that story. (PTX 49). Similarly, the Washington Post gave prominent coverage to President Ford's Hungate testimony and described the conversation with Alexander Haig on the front page. (PTX 50). The details of these conversations were also covered in full in the best selling 1976 book by Woodward and Bernstein, The Final Days (PTX 57), in the 1976 book by J. Anthony Lukas, Nightmare (PTX 58), which Mr. Navasky considered to be the authoritative book on Watergate (Navasky, TR. 440), and in the 1975 book on the first one hundred days of the Ford presidency, A Ford Not A Lincoln, written

by Mr. Reaves, an expert witness called by the Nation in this case. In addition, the November 9, 1974 issue of the Nation (PTX 52), had included an article covering and criticizing the Hungate testimony.

46. Prior to publishing the article, Mr. Navasky made no investigation whatsoever to determine the extent to which President Ford's story about the Nixon pardon was new, or the extent to which it had already been disclosed in the public record or the press. He did not look at the Hungate testimony. (Navasky, TR. 440).***

54. Mr. Navasky's expressed desire to beat out the competition (TR. 466-67) and to "make news" (TR. 467-68) and create a "news event" (TR. 536) so as to get additional coverage for his magazine through the wire services (TR. 452-53;

456) refers to benefits Mr. Navasky was seeking for the Nation and not to any necessity for publication of excerpts in advance of publication authorized by the copyright owner.

57. A major purpose in publishing the article was to advance the commercial interest of the Nation magazine.***

66. The publication by the Nation had the clearly foreseeable effect of destroying plaintiffs' ability to grant exclusive first serialization rights to Time and depriving Harper & Row and Reader's Digest of the benefit of their contract with Time magazine.

67. The Nation knew of the plaintiffs' contract with Time permitting advance excerpts from the book to be published in Time magazine and wanted to "scoop" the former president and Time in

publishing excerpts from Ford's accounts of Nixon's resignation and the pardon. The Nation also knew that the book's print order and sales depended upon public reception to the Time excerpts (PTX 10, 21 and 22, Nation April 7, 1979 article and later editorials). At trial, the Nation's editor, Mr. Navasky, also testified that it occurred to him at the time he had access to Ford's unpublished manuscript, that the same portions that the Nation copied would be of interest to Time magazine. (TR. 476).

CONCLUSIONS OF LAW

1. This is an action arising under the copyright laws of the United States, 17 U.S.C. §§101 et seq. The Court, therefore, has exclusive jurisdiction of this action under 28 U.S.C. §1338(a).

2. Plaintiffs are the copyright owners of the exclusive literary rights

in the unpublished manuscript of the memoirs of former President Ford, an original literary work within the meaning of Sections 102(a)(1) and 101 of the Copyright Act.

3. Plaintiffs' exclusive rights in the unpublished manuscript were infringed by the defendants in their publication in the April 7, 1979 issue of the Nation magazine of an article entitled "Behind the Nixon Pardon" (the "Nation article").

4. Three separate exclusive rights were infringed by the Nation article: (i) the right to produce the copyrighted work in copies, (ii) the right to license the preparation of derivative works based upon the copyrighted work, and (iii) the right of first distribution of copies of the copyrighted work to the public (Section 106 (1), (2) and (3) of the Copyright Act).

5. Defendants' access to the unpublished manuscript and actual copying are admitted (PTX 1a, 18, 19, 200; PTX 33, Navasky Dep. at 30-33). In addition, plaintiffs have shown by clear and convincing evidence substantial similarity of copyrightable expression between the unpublished manuscript and the Nation article.

6. Defendants have failed to establish a fair use defense. ***

(a) Nature and Purpose of Defendants' Use

(i) The Nation article did not constitute sufficiently legitimate news reporting to warrant disregard of author's protection. Wainright Sec. Inc. v. Wall Street Transcript Corp., 558 F. 2d 91, 95-96 (2d Cir. 1977), cert. denied, 434 U.S. 1014 (1978). ***

(b) Nature of the Copyrighted Work

The copyrighted work is an unpublished, autobiographical manuscript, entitled to copyright protection. The fair use defense is narrowed when the work is unpublished.

(c) Substantiality of Defendants' Taking

(i) The Nation article appropriated copyrightable expression far in excess of what was necessary to satisfy any conceivably legitimate news reporting purpose.

(ii) The amount taken by the Nation was qualitatively substantial with respect to the manuscript, and constituted virtually the whole of the Nation article.

(d) Market Impact

The Nation's publication had a clear adverse impact on the market for

the work, including first serialization rights.

SO ORDERED
/s/ Richard Owen
United States District Judge

February 16, 1983

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DENYING PETITION FOR REHEARING

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York on the 4th day of January one thousand nine hundred and eighty-four.

HARPER & ROW, PUBLISHERS, INC., and THE READER'S DIGEST ASSOCIATION, INC.,

Plaintiffs-Appellees-Cross-Appellants,

v.

NATION ENTERPRISES and THE NATION ASSOCIATES, INC.,

Defendants-Appellants-Cross-Appellees.

Nos. 83-7277,83-7327

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellees-cross-appellants, Harper & Row, et al.,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is denied, Judge Meskill dissenting.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

A. Daniel Fusaro, Clerk

by Francis X. Gindhart,
Chief Deputy Clerk

APPENDIX E

COMPARISON OF THE TEXT OF THE NATION ARTICLE "BEHIND THE NIXON PARDON" AND PORTIONS OF THE UNPUBLISHED MANUSCRIPT OF "A TIME TO HEAL" BY PRESIDENT GERALD FORD

Appendix E is a typeset version of Plaintiff's Exhibit 11, received in evidence during the trial.

On the left-hand side of the following pages is the complete text of the Nation Article.

On the right-hand side are portions of the unpublished manuscript of President Ford. The original of this exhibit reproduces the actual manuscript pages, or portions thereof, which include corrections, words crossed out, insertions and the like. These are not relevant to the issues in the case and have not been reproduced in the typeset version. The numbers in parentheses (referring to manuscript pages), the asterisks (indicating deletions) and the yellowing are reproduced as they appear in the exhibit.

The Nation
April 7, 1979
Complete Text of "Behind the Nixon Pardon"
[LEFT SIDE OF FOLLOWING PAGES]

THE FORD MEMOIRS

BEHIND THE NIXON PARDON

In his memoirs, *A Time to Heal*, which Harper & Row will publish in late May or early June, former President Gerald R. Ford says that the idea of giving a blanket pardon to Richard M. Nixon was raised before Nixon resigned from the Presidency by Gen. Alexander Haig, who was then the White House chief of staff.

[RIGHT SIDE OF FOLLOWING PAGES]

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EDITOR'S NOTE

PAGES E-4 through E-41 WERE POOR HARD COPY AT THE TIME OF FILMLNG. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

The Nation Article

Ford also writes that, but for a misunderstanding, he might have selected Ronald Reagan as his 1976 running mate.

that Washington lawyer Edward Bennett Williams, a Democrat, was his choice for head of the Central Intelligence Agency.

that Nixon was the one who first proposed Nelson Rockefeller for Vice President,

and that he regretted his "cowardice" in allowing Rockefeller to remove himself from Vice Presidential contention.

The Ford Manuscript

Later I was told that just before my arrival at the Californian's hotel, of of his closest advisers, businessman Justin Dart, had urged him to say yes if I asked him to be my running mate. Regardless of anything he'd said before, Dart had insisted, it was his patriotic duty to accept the number two post. Finally, according to Dart, Reagan had agreed. But at the time, no one mentioned this new development to me. **Had I been aware of the Dart-Reagan conversation, would I have chosen him?** I can't say for sure — I thought his challenge had been divisive, and that it would probably hurt the party in the fall campaign; additionally, I resented some of the things that he'd been saying about me and my Administration's Policies — **but I certainly would have considered him.**

• • •

Washington attorney Edward Bennett Williams was my first choice. He was a brilliant lawyer, a savvy Washingtonian with an interest in intelligence matters and a Democrat, which meant that he'd probably win Senate confirmation easily. (401)

• • •

Then we talked about who my Vice President would be. **He suggested that Nelson A. Rockefeller, the four-term governor of New York, would be a wise selection.** (44)

• • •

Inwardly, **I was angry with myself for showing cowardice in not saying to the ultra-conservatives, "It's going to be Ford and Rockefeller,** whatever the consequences." (496)

The Nation Article

Ford also describes his often prickly relations with Henry Kissinger.

The Nation obtained the 655-page typescript before publication. Advance excerpts from the book will appear in *Time* in mid-April and in *The Reader's Digest* thereafter. Although the initial print order has not been decided, the figure is tentatively set at 50,000; it could change, depending upon the public reaction to the serialization.

Ford's account of the Nixon pardon contains significant new detail on the negotiations and considerations that surrounded it. According to Ford's version, **the subject was first broached to him by General Haig on August 1, 1974, a week before Nixon resigned. General Haig revealed that the newly transcribed White House tapes were the equivalent of the "smoking gun" and that Ford should prepare himself to become President.**

The Ford Manuscript

Shortly before 9 o'clock on the warm, cloudy morning of August 1, 1974, I received a telephone call from General Alexander M. Haig, Jr. (1)

• • •

The new tapes, he said, contained evidence that would contradict Nixon's version of events in the Watergate scandal. The evidence would prove that Nixon knew about the cover-up six days after the break-in at the Democratic National Committee headquarters and that he'd been deceiving the American people ever since. He hadn't seen the evidence himself, Haig said, but he'd been told about it by people who had. They had explained that **it contained the so-called smoking gun,** and he felt sure that they were telling the truth. (2-3)

• • •

Now he came to the point: "Are you ready, Mr. Vice President, to assume the Presidency in a short period of time?" (4)

The Nation Article

Ford was deeply hurt by Haig's revelation: "Over the past several months Nixon had repeatedly assured me that he was not involved in Watergate, that the evidence would prove his innocence, that the matter would fade from view." Ford had believed him, but he let Haig explain the President's alternatives.

He could "ride it out" or he could resign, Haig said.

He then listed the different ways Nixon might resign and concluded by pointing out that Nixon could agree to leave in return for an agreement that the new President, Ford, would pardon him.

The Ford Manuscript

The hurt was very deep, and I wasn't sure that I could adequately express it in words to anyone, least of all to Nixon himself. (8)

* * *

Repeatedly over the past several months, Nixon had assured me that he was not involved in Watergate, that the evidence would prove his innocence, that the matter would fade from view. He had said much the same thing to his Cabinet and staff, to his family and to the American people. I had chosen to believe him, and I had tried to give him the benefit of every doubt. (7)

* * *

Carefully, Haig laid out the options that the "knowledgeable people" on the White House staff had agreed were still available to the President. The first was that he could try to "ride it out" by letting impeachment take its natural course through the House and the Senate trial, fighting against conviction all the way. His second option was to resign.

Here the number of alternatives increased. Under provisions of the 25th Amendment to the Constitution, he could step aside temporarily. He could delay his resignation until further along in the impeachment process. He could try to settle for a censure vote in the Congress. He could pardon himself and everyone else involved in Watergate and then resign. Finally, Haig said that according to some on Nixon's White House staff, Nixon could agree to leave in return for an agreement that the new President — Gerald Ford — would pardon him. (4-5)

The Nation Article

Although Ford said it would be improper for him to make any recommendation, he basically agreed with Haig's assessment and adds, "Because of his references to the pardon authority, I did ask Haig about the extent of a President's pardon power."

It's my understanding from a White House lawyer," Haig replied, "that a President does have authority to grant a pardon even before criminal action has been taken against an individual."

But because Ford had neglected to tell Haig he thought the idea of a resignation conditioned on a pardon was improper, his press aide, Bob Hartmann, suggested that Haig might well have returned to the White House and told President Nixon that he had mentioned the idea and Ford seemed comfortable with it. "Silence implies assent."

Ford then consulted with White House special counsel James St. Clair, who had no advice one way or the other on the matter more than pointing out that he was not the lawyer who had given Haig the opinion on the pardon.

The Ford Manuscript

I had no doubts about his basic assumptions. (5)

• • •

I didn't think it would be proper for me to make any recommendations at all, and I told him so. Because of his references to pardon authority, I did ask Haig about the extent of a President's pardon power.

"It's my understanding from a White House lawyer," Haig replied, "that a President does have authority to grant a pardon even before criminal action has been taken against an individual." (5-6)

• • •

And he mentioned the pardon option, and you sat there listening to him. Well, silence implies assent. He probably went back to the White House and told Nixon that he'd mentioned the idea and that you weren't uncomfortable with it. It was extremely improper for him to bring the subject up." (8)

• • •

Shortly after 8 o'clock the next morning, I met with James St. Clair, the Boston attorney who had been handling Nixon's impeachment defense for the past seven months. (14)

• • •

Then I told him about the options that Haig had mentioned to me the afternoon before. St. Clair listened quietly, commenting only that he had not been the source of any White House staff opinion about a President's power to issue pardons. (15)

The Nation Article

Ford also discussed the matter with Jack Marsh, who felt that the mention of a pardon in this context was a "time bomb," and with Bryce Harlow, who had served six Presidents and who agreed that the mere mention of a pardon "could cause a lot of trouble."

The Ford Manuscript

No sooner had St. Clair left than I called in Marsh. I briefed Jack on everything that had occurred in the past 24 hours. He seemed just as stunned by the news as I had been. That is not to say that he registered much emotion. Anyone who can make 38 parachute jumps while serving as a Congressman has to be fairly calm and unflappable. And Jack was certainly that. But he was also a man of incredibly good judgment. He agreed with Bob that the mere mention of the pardon option constituted a potential time bomb for me. (16)

* * *

The question then became: To whom could I turn? Almost instantly, Bryce Harlow came to mind. A short, solemn-faced Oklahoman who had already served six Presidents, he was a man of total integrity. (16)

* * *

He came to my office late in the afternoon and with Hartmann present, I told him everything I knew. He listened impassively, his expression betraying no emotion at all. Only after I had finished did he let me know in no uncertain terms that he agreed with Bob and Jack, that the mere mention of the pardon option could cause a lot of trouble in the days ahead. (18)

The Nation Article

As a result of these various conversations, Vice President Ford called Haig and read him a written statement: "I want you to understand that I have no intention of recommending what the President should do about resigning or not resigning and that nothing we talked about yesterday afternoon should be given any consideration in whatever decision the President may wish to make."

Despite what Haig had told him about the "smoking gun" tapes, Ford told a Jackson, Mich., luncheon audience later in the day that the President was not guilty of an impeachable offense. "Had I said otherwise at that moment," he writes, "the whole house of cards might have collapsed."

In justifying the pardon, Ford goes out of his way to assure the reader that "compassion for Nixon as an individual hadn't prompted my decision at all." Rather, he did it because he had "to get the monkey off my back one way or the other."

The Ford Manuscript

We agreed that the only thing I could do would be to call Haig in the presence of witnesses and button this thing down. Minutes later, Haig was on the line. I had written out in longhand what I wanted to say to him, and I read it slowly so that there could be no ambiguities. "I want you to understand," I said, "that I have no intention of recommending what the President should do about resigning or not resigning and that nothing we talked about yesterday afternoon should be given any consideration in whatever decision the President may wish to make." (19)

• • •

Representative Thad Cochran (who was elected Mississippi's first Republican Senator in 1978) was among the notables who met me as I stepped onto the tarmac and escorted me to a luncheon at the Jackson Hilton Hotel. During the luncheon I repeated my assertion that the President was not guilty of an impeachable offense. Had I said otherwise at that moment, the whole house of cards might have collapsed. (21)

• • •

But compassion for Nixon as an individual hadn't prompted my decision at all. (266)

• • •

All this forced me to address the issue squarely for the first time. I had to get the monkey off my back one way or another. (236)

The Nation Article

The precipitating factor in his decision was a series of secret meetings his general counsel, Phil Buchen, held with Watergate Special Prosecutor Leon Jaworski in the Jefferson Hotel, where they were both staying at the time. Ford attributes Jaworski with providing some "crucial" information—i.e., that Nixon was under investigation in ten separate areas, and that the court process could "take years." Ford cites a memorandum from Jaworski's assistant, Henry S. Ruth Jr., as being especially persuasive. Ruth had written:

"If you decide to recommend indictment I think it is fair and proper to notify Jack Miller and the White House sufficiently in advance so that pardon action could be taken before the indictment." He went on to say: "One can make a strong argument for leniency and if President Ford is so inclined. I think he ought to do it early rather than late."

The Ford Manuscript

For the past several days, Buchen had also been meeting with Jaworski. Their contacts had been facilitated by the fact that both men were staying at the Jefferson Hotel. They could shuttle between floors without attracting undue attention. Jaworski never said so, but it became obvious to Phil that he thought the grand jury would indict Nixon soon. (After all, Phil remembered, the grand jury had named Nixon as an unindicted co-conspirator in the Watergate cover-up several months before.) Then, on the afternoon of September 4, Jaworski gave Phil several crucial pieces of information. (246)

• • •

Shortly after 4 o'clock on the afternon of September 5, Buchen and Becker came into the Oval Office and showed me Jaworski's opinion. It was worrisome. Even if a full year elapsed before a trial could begin, there was no telling how long it would last. And if the verdict was Guilty, one had to assume that Nixon would appeal. That process would take years. Of equal concern to me was a memorandum which the Special Prosecutor had attached. It was from Henry S. Ruth, Jr., Jaworski's deputy, and it listed ten areas of investigation that prosecutors were pursuing. (248)

• • •

Ruth, of course, had given Jaworski his own recommendations: "If you decide to recommend indictment, I think it fair and proper to notify Jack Miller and the White House sufficiently in advance so that pardon action could be taken before indictment." He went on to say: "One can make a strong argument for leniency, and if President Ford is so inclined, I think he ought to do it early rather than late." That influenced me because Ruth knew as much about Watergate as anyone. He was simply putting the nation's interests first. Which was precisely what I would have to do. (249)

The Nation Article

Ford decided that court proceedings against Nixon might take six years, that Nixon "would not spend time quietly in San Clemente," and "it would be virtually impossible for me to direct public attention on anything else."

Buchen, Haig and Henry Kissinger agreed with him, Hartmann was not so sure.

The Ford Manuscript

Months were sure to elapse between an indictment and trial. The entire process would no doubt require years: a minimum of two, a maximum of six. And Nixon would not spend time quietly in San Clemente. He would be fighting for his freedom, taking his cause to the people, and his constant struggle would have dominated the news. The story would overshadow everything else.

No other issue could compete with the drama of a former President trying to stay out of jail. It would be virtually impossible for me to direct public attention on anything else. (238-39)

* * *

Buchen, I knew already, was inclined to favor the idea. Haig was for it too, although he never flatly said as much. He laid out the pros and cons, then stepped back and said, "It's your decision, sir." When I talked to Kissinger at one of our private morning meetings, he said he thought it was the right thing to do. It was the quickest, really the only way to clear the center stage. The spectacle of a former President on trial would damage our country's image internationally. It was a very impressive argument.

However, Hartmann and Marsh had reservations. (239)

The Nation Article

Buchen wanted to condition the pardon on Nixon agreeing to settle the question of who would retain custody and control over the tapes and Presidential papers that might be relevant to various Watergate proceedings, but Ford was reluctant to do that.

At one point a plan was considered whereby the Presidential materials would be kept in a vault at a Federal facility near San Clemente, but the vault would require two keys to open it. One would be retained by the General Services Administration, the other by Richard Nixon.

The Ford Manuscript

"Look," he said, "if you're going to do this to put Watergate behind you, I think you also ought to let me see how far we can go to get an agreement on the papers and tapes and have that in place at the same time."

"Well," I said, "if you can get the papers and tapes question settled prior to the pardon, that's fine. Let's get it behind us. But I don't want to condition the pardon on his making an agreement on the papers and tapes, and I don't want you to insist on any particular terms." (243)

. . .

After discussing the problem with Miller, Buchen and Becker came up with the concept of a Presidential deed of gift of the papers and tapes to the United States. Under this proposal, the documents would be stored at a federal facility near San Clemente. Nixon and the government would share formal ownership and the materials would be available for court subpoenas for between three and five years. To ensure their security, two keys would be needed to open the vault. Nixon would have one, the General Services Administration the other. (245)

The Nation Article

The White House did, however, want Nixon to make a full confession on the occasion of his pardon or, at a minimum, express true contrition. Ford tells of the negotiation with Jack Miller, Nixon's lawyer, over the wording of Nixon's statement. But as Ford reports Miller's response, Nixon was not likely to yield. "His few meetings with his client had shown him that the former President's ability to discuss Watergate objectively was almost nonexistent."

The Ford Manuscript

Then Phil added: "Look, I think it's important that there be a statement of true contrition from the former President. The President tells me we can't dictate that statement, but in the interests of both your client and the President, I hope you would persuade your client to develop something that would tell the world, 'Yes, he did it, and he's accepting the pardon because he's guilty.' "

Miller said he understood and volunteered his belief that if the pardon were granted, Nixon should issue a statement admitting his involvement in Watergate. But he wasn't optimistic about getting such a statement. His few meetings with his client had shown him that the former President's ability to discuss Watergate objectively was almost nonexistent. (246)

The Nation Article

The statement they really wanted was never forthcoming. As soon as Ford's emissary arrived in San Clemente, he was confronted with an ultimatum by Ron Zeigler, Nixon's former press secretary. "Let's get one thing straight immediately," Zeigler said. "President Nixon is not issuing any statement whatsoever regarding Watergate, whether Jery Ford pardons him or not." Zeigler proposed a draft,which was turned down on the ground that "*no* statement would be better than that." They went through three more drafts before they agreed on the statement Nixon finally made, which stopped far short of a full confession.

The Ford Manuscript

The story Becker told me upon his return to Washington on Saturday was poignant. No sooner had he arrived in San Clemente very late Thursday night than Ron Ziegler had confronted him with an ultimatum. "Let's get one thing straight immediately," Ziegler said. "President Nixon is not issuing any statement whatsoever regarding Watergate, whether Jerry Ford pardons him or not." (250)

* * *

The discussions in San Clemente then turned to the response Nixon would make if he received a pardon. The first draft that Ziegler prepared for Becker was disastrous. It spoke of the pressures of the office of the President, the necessity for reliance upon the judgment and the honesty of the White House staff and the President's preoccupation with international affairs.

It concluded by acknowledging that Nixon should have delegated less authority to — and placed less reliance on — the members of his staff. That was all. When Ziegler asked Becker what he thought of it, Becker replied that *no* statement would be better than that. (250-51)

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Ziegler went through three more drafts. (251)

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Becker wasn't satisfied. It wasn't the "full confession" he'd been hoping the former President would make, and he suspected that it would fall far short of what I wanted Nixon to say. (252)

The Nation Article

When Ford aide Benton Becker tried to explain to Nixon that acceptance of a pardon was an admission of guilt, he felt the President wasn't really listening. instead, Nixon wanted to talk about the Washington Redskins. And when Becker left, Nixon pressed on him some cuff links and a tiepin "out of my own jewelry box."

Ultimately, Ford sums up the philosophy underlying his decision as one he picked up as a student at Yale Law School many years before. "I learned that public policy often took precedence over a rule of law. Although I respected the tenet that no man should be above the law, public policy demanded that I put Nixon — and Watergate — behind us as quickly as possible."

The Ford Manuscript

What Becker wanted to do was to explain the Burdick case of 1915 and restate the White House view that acceptance of a pardon was an acknowledgment of guilt. But Nixon didn't seem to want to talk about that. He must have thought Becker came from Grand Rapids because he was surprised to learn that he lived in Washington. When Becker told him that, the former President asked, "How are the Redskins going to do this year?" (253)

* * *

He opened a desk drawer and pulled out two little boxes containing cuff links and a tie pin. "She got these out of my own jewelry box," Nixon continued. "There aren't any more in the whole world. I want you to have them." (254)

* * *

I especially wanted it understood that my fundamental decision to grant a pardon had nothing to do with any sympathy I might feel for Nixon personally or any concern I might have for the state of his health. Years before, at Yale Law School, I'd learned that public policy often took precedence over a rule of law. Although I respected the tenet that no man should be above the law, public policy demanded that I put Nixon — and Watergate — behind us as quickly as possible. (256)

The Nation Article

Later, when Ford learned that Nixon's phlebitis had acted up and his health was seriously impaired, he debated whether to pay the ailing former President a visit. "If I made the trip it would remind everybody of Watergate and the pardon. If I didn't, people would say I lacked compassion." Ford went:

He was stretched out flat on his back. There were tubes in his nose and mouth, and wires led from his arms, chest and legs to machines with orange lights that blinked on and off. His face was ashen, and I thought I had never seen anyone closer to death.

The Ford Manuscript

Late in October, Richard Nixon's health took a turn for the worse. The phlebitis in his left leg created blood clots that threatened his life, and doctors decided to operate. After the operation he went into shock, and doctors said his condition was critical. On October 31, I flew to Los Angeles to speak at a dinner for Republican candidates at the Century Plaza Hotel. My staff debated whether or not I ought to visit Nixon at the Long Beach Hospital, only half an hour away. If I made the trip, it would remind everyone of Watergate and the pardon. If I didn't, people would say I lacked compassion. I ended their debate as soon as I found out that it had begun. Of course I would go. (298)

. . .

When I stepped into the room and saw Nixon's condition, I was even more shocked than I had been by door. [sic] He was stretched out flat on his back. There were tubes in his nose and mouth, and wires led from his arms, chest and legs to machines with orange lights that blinked on and off. His face was ashen, and I thought I had never seen anyone closer to death. (299)

The Nation Article

The manuscript made available to *The Nation* includes many references to Henry Kissinger and other personalities who played a major role during the Ford years.

On Kissinger. Immediately after being informed by Nixon of his intention to resign, Ford returned to the Executive Office Building and phoned Henry Kissinger to let him know how he felt. "Henry," he said, "I need you. The country needs you. I want you to stay. I'll do everything I can to work with you."

"Sir," Kissinger replied, "it is my job to get along with you and not yours to get along with me."

"We'll get along," Ford said. "I know we'll get along." Referring to Kissinger's joint jobs as Secretary of State and National Security adviser to the President, Ford said, "I don't want to make any change. I think it's worked out well, so let's keep it that way."

The Ford Manuscript

But that, I knew, would be impossible, for there were still too many things to do. As soon as I returned to the EOB, I telephoned Kissinger. I thought it was urgent to tell him right away how I felt about him. "Henry," I said when he came on the line, "I need you. The country needs you. I want you to stay. I'll do everything I can to work with you."

"There will be no problem," he replied in his deep, accented voice. "Sir, it is my job to get along with you and not yours to get along with me."

"We'll get along," I said. "I know we can get along." We talked about the two hats he wore, as Secretary of State and National Security Adviser to the President. "I don't want to make any change," I said. "I think it's worked out well, so let's keep it that way." (46)

The Nation Article

Later Ford did make the change and relieved Kissinger of his responsibilities as National Security Adviser at the same time that he fired James Schlesinger as Secretary of Defense. Shortly thereafter, he reports, Kissinger presented him with a "draft" letter of resignation, which he said Ford could call upon at will if he felt he needed it to quiet dissent from conservatives who objected to Kissinger's role in the firing of Schlesinger.

On John Connally. When Ford was informed that Nixon wanted him to replace Agnew, he told the President he had "no ambition to hold office after January 1977." Nixon replied that that was good since his own choice for his running mate in 1976 was John Connally. "He'd be excellent," observed Nixon. Ford says he had "no problem with that."

The Ford Manuscript

On Saturday afternoon, October 25, I called Kissinger and Rumsfeld into the Oval Office and explained what I wanted to do. The only way I could feel comfortable with my own team in place, I said, was to fire Schlesinger, ask Colby to submit his resignation, bring Bush back as director of the CIA, send Rumsfeld over to Defense, take away one of Kissinger's two hats and upgrade both Cheney and Scowcroft. (494)

* * *

Early in January, in fact, he had come into the Oval Office and handed me a "draft" of his letter of resignation as Secretary of State. His motivation, he explained, was political. Conservatives still blamed him for my dismissal of Schlesinger, although he had had nothing to do with it. (537)

* * *

Nixon came directly to the point. Because of the Agnew tragedy, he said, there was an urgent need to restore public confidence in the office of Vice President. He wanted me to be his nominee. Then as asked if I'd made any political plans. I told him about my promise to Betty and said that I had no ambitions to hold office after January 1977. Just because I'd be serving as Vice President for the remainder of his term didn't mean I'd expect to be the Presidential nominee in 1976.

"Well, that's good," Nixon replied, "because John Connally is my choice for 1976. He'd be excellent."

"That's no problem as far as I'm concerned," I said, and told him about my discussions with Connally in Palm Springs several months before. (155-56)

The Nation Article

On the Decision to Run Again. Ford was, he tells us, so sincere in his intention not to run again that he thought he would announce it and enhance his credibility in the country and the Congress, as well as keep the promise he had made to his wife, Betty.

Kissinger talked him out of it. "You can't do that. It would be disastrous from a foreign policy point of view. For the next two and a half years foreign governments would know that they were dealing with a lame-duck President. All our initiatives would be dead in the water, and I wouldn't be able to implement your foreign policy. It would probably have the same consequences in dealing with the Congress on domestic issues. You can't reassert the authority of the Presidency if you leave yourself hanging out on a dead limb. You've got to be an affirmative President."

The Ford Manuscript

At about the same time that I was changing Nelson's future political plans, I was also altering my own. Bearing in mind my promise to Betty that I would retire in January 1977, as well as the statements I'd made during my confirmation hearings on Capitol Hill, I was giving serious thought to announcing once again that I would not be a candidate in 1976. If I did that, I thought, my credibility would be enhanced in both Congress and the country at large, and none of the tough decisions that I had to make could be challenged on political grounds. This very logical scenario dismayed Henry Kissinger. "Mr. President," he said, "You can't do that. It would be disastrous from a foreign policy point of view. For the next 2½ years foreign governments would know that they were dealing with a lame-duck President. All our initiatives would be dead in the water, and I wouldn't be able to implement your foreign policy. It would probably have the same consequences in dealing with the Congress on domestic issues. You can't reassert the authority of the Presidency if you leave yourself hanging out on a dead limb. You've got to be an affirmative President. you've got to hold off on any announcement like that." (216)

The Nation Article

On David Kennerly, the White House photographer. Schlesinger was arguing with Kissinger and Ford over the appropriate response to the seizure of the *Mayaguez*. At issue was whether airstrikes against the Cambodians were desirable: Schlesinger was opposed to bombings. Following a lull in the conversation, Ford reports, up spoke the 30-year-old White House photographer, David Kennerly, who had been taking pictures for the last hour.

"Has anyone considered," Kenerly asked, "that this might be the act of a local Cambodian commander who has just taken it into his own hands to stop any ship that comes by?" Nobody, apparently, had considered it, but following several seconds of silence, Ford tells us, the view carried the day. "Massive airstrikes would constitute overkill." Ford decided, "It would be far better to have Navy jets from the *Coral Sea* make surgical strikes against specific targets."

The Ford Manuscript

And this is where Kissinger and I disagreed with Schlesinger. Our first consideration, of course, was the recovery of the ship and her crew. But Henry and I felt that we had to do more. We didn't want the Cambodians to be in a position to reinforce Koh Tang island once our attack began. We wanted them to know that we meant business, so we opted for air strikes against the mainland as well. Schlesinger agreed that our first priority should be to rescue the ship and her crew, but he was far less eager to use *Mayaguez* as an example for Asia and the world. He was concerned that our bombing plans were too extensive. There was a lull in the discussion. Then, from the back of the room, a new voice spoke up. It was Kennerly, who had been taking pictures of us for the past hour or so. Never before during a meeting of this kind had he entered the conversation; I knew he wouldn't have done so now unless what he had to say was important so I listened carefully.

"Has anyone considered," he asked, "that this might be the act of a local Cambodian commander who has just taken it into his own hands to stop any ship that comes by? (415)

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For several seconds there was silence in the Cabinet Room. (416)

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The decision was up to me. Subjectively, I felt that what Kennerly had said made a lot of sense. Massive airstrikes would constitute overkill. It would be far better to have Navy jets from *Coral Sea* make surgical strikes against specific targets in the vicinity of Kompong Som. (416)

The Nation Article

On Nixon's Character. Nixon's flaw, according to Ford, was "pride." "A terribly proud man," writes Ford, "he detested weakness in other people. I'd often heard him speak disparagingly of those whom he felt to be soft and expedient. (Curiously, he didn't feel that the press was weak. Reporters, he sensed, were his adversaries. He knew they didn't like him, and he responded with reciprocal disdain.)"

Nixon felt disdain for the Democratic leadership of the House, whom he also regarded as weak. According to Ford, "His pride and personal contempt for weakness had overcome his ability to tell the difference between right and wrong," all of which leads Ford to wonder whether Nixon had known in advance about Watergate.

The Ford Manuscript

In Nixon's case, that flaw was pride. A terribly proud man, he detested weakness in other people. I'd often heard him speak disparagingly of those whom he felt to be soft and expedient. (Curiously, he didn't feel that the press was weak. Reporters, he sensed, were his adversaries. He knew they didn't like him, and he responded with reciprocal disdain.) He was very bitter about members of Congress who wanted to cut and run from our obligations in South Vietnam, and he detested those lawmakers who were trying to hamstring his efforts to settle the war from a position of strength. He felt that ever since the days of House Speakers Sam Rayburn and John McCormack and Senate Majority Leader Lyndon Johnson, the Democratic leadership of the Congress had been eroding. Because it had become inherently weak, it was deserving of his contempt. That attitude was reflected in his selection of Bob Haldeman and John Ehrlichman as the White House aides through whom he wanted to deal with the Hill.

It was reflected, too, in his explanations of Watergate. His pride and personal contempt for weakness had overcome his ability to tell the difference between right and wrong. What some journalists called the "dark side" of his personality had prevailed over his judgment, which was normally sound. And once the course had been set, there was no turning back.

As I sat in our family room, I wondered whether he had known in advance about the break-in at the Watergate. (53-54)

The Nation Article

On hearing Nixon's resignation speech, which Ford felt lacked an adequate plea for forgiveness, he was persuaded that "Nixon was out of touch with reality."

In February of last year, when *The Washington Post* obtained and printed advance excerpts from H.R. Haldeman's memoir, *The Ends of Power*, on the eve of its publication by Times Books, *The New York Times* called *The Post*'s feat "a second-rate burglary."

The Post disagreed, claiming that its coup represented "first-rate enterprise" and arguing that it had burglarized nothing, that publication of the Haldeman memoir came under the Fair Comment doctrine long recognized by the courts, and that "There is a fundamental journalistic principle here—a First Amendment principle that was central to the Pentagon Papers case."

In the issue of *The Nation* dated May 5, 1979, our special Spring Books number, we will discuss some of the ethical problems raised by the issue of disclosure.

The Ford Manuscript

The speech lasted fifteen minutes, and at the end I was convinced that Nixon was out of touch with reality. The fact that he was linking his resignation to the loss of his Congressional base shocked me then and disturbs me still. If he had been more contrite and asked the American people for forgiveness, he would have received a warmer response. Yet he couldn't take that final step. I'm convinced he thought what he said was enough. (57)